
Articles

The Transfer of Public Lands Movement: The Battle to Take “Back” Lands That Were Never Theirs

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INTRODUCTION

Long a hotbed of discontent over federal public land management, Utah rekindled the “sagebrush rebellion” in 2012 when it enacted the Transfer of Public Lands Act (“TPLA”),¹ demanding that the federal government turn millions of acres of public land² over to the state. Utah’s efforts became a model for legislation that sprang up across the West, and transfer theories were adopted as part of the Republican National Committee Platform. A growing minority is also seizing on Utah’s theories to justify wresting public lands from the federal government, too often in violent ways.

The transfer movement taps into a long history of western antagonism toward federal land ownership. This broad discontent, when combined with the threat of litigation, could lead to federal legislation devolving the public domain to the states—and that could forever reshape our nation.

Part I summarizes the TPLA and the movement that the Act spawned. Part II puts current demands into context, reviewing the acquisition and disposal of the public domain, federal authority over public lands, and evolution of public land management policies. Part III evaluates the legal and policy arguments favoring compulsory public land disposal. Part IV summarizes the policy arguments behind, and the unintended consequences that would flow from, a public land transfer. Part V proceeds from the premise that it is not enough to identify the frustrations driving transfer efforts, offering constructive alternatives to transfer that address the underlying frustrations.

I. SAGEBRUSH REBELLION REVISITED — THE PUBLIC LANDS TRANSFER MOVEMENT

Millions of acres of highly coveted lands and minerals remain in federal ownership. Dissatisfied with management that does not reflect the wishes of many state legislators, Utah, in 2012, enacted legislation demanding title to 31.2 million acres of federally managed lands. Enticed

¹ H.B. 148, 2012 Gen. Sess. (Utah) (codified at UTAH CODE ANN. §§ 63L-6-101 through 104 (2014)).

² As used herein, “public lands” refers to any land or interest in land acquired by the United States from other sovereigns, including Indian tribes, that has not been conveyed out of federal ownership. It excludes military lands and is used interchangeably with the term “public domain.”

by the prospect of quick riches, legislators across the West took up the issue. Interest from other states was understandable because of common frustrations and shared histories. As federal legislation authorizing statehood is generally consistent state-to-state, Utah's arguments, if successful, would likely apply West-wide, and permanently remake the West.

Transfer demands reflect frustrations that are as old as the nation itself and that re-emerge every generation or so.³ Much has been written about the Sagebrush Rebellion;⁴ this Article intersperses bits and pieces of that history throughout to contextualize today's narrative.

A. Utah's Transfer of Public Lands Act

Signed into law on March 23, 2012, the TPLA demands that by December 31, 2014, the United States transfer title to public lands within Utah to the state.⁵ Under the TPLA, "public lands" include all federal lands except national parks, national monuments (other than the Grand Staircase-Escalante National Monument, which would be conveyed to the state), congressionally-designated Wilderness Areas, Department of Defense areas, and tribal lands.⁶ The lands at issue are administered primarily by the Bureau of Land Management ("BLM") and the U.S. Forest Service ("USFS"), and also include the Glen Canyon National Recreation Area that is administered by the National Park Service.

³ See e.g., Richard M. Mollison & Richard W. Eddy, Jr., *The Sagebrush Rebellion: A Simplistic Response to the Complex Problem of Federal Land Management*, 19 HARV. J. ON LEGIS. 97, 100, n. 14 (1982) (cataloguing demands to cede federal lands to the states from Alabama, Illinois, Indiana, Louisiana, and Missouri). See also, John D. Leshy, *Unraveling the Sagebrush Rebellion: Law, Politics, and Federal Lands*, 14 U.C. DAVIS L. REV. 317 (1980).

⁴ For a thorough discussion of the sagebrush rebellion, see, Robert L. Fischman & Jeremiah I. Williamson, *The Story of Kleppe v. New Mexico: The Sagebrush Rebellion as Un-Cooperative Federalism*, 83 U. COLO. L. REV. 123 (2011); George Cameron Coggins, 'Devolution' in Federal Land Law: Abdication by Any Other Name. . . , 14 HASTINGS W.-NW J. OF ENVTL. L. & POLICY 485 (2008); Robert L. Glicksman, *Fear and Loathing on the Federal Lands*, 45 U. KAN. L. REV. 647 (1997); Scott W. Reed, *The County Supremacy Movement: Mendacious Myth Making*, 30 IDAHO L. REV. 525 (1994); Leshy, *supra* note 3; Paul W. Gates, *The Intermountain West Against Itself*, 27 J. OF THE SW. 205 (1985); Bruce Babbitt, *Federalism and the Environment: An Intergovernmental Perspective of the Sagebrush Rebellion*, 12 ENVTL. L. 847 (1982).

⁵ UTAH CODE ANN. § 63L-6-103(1).

⁶ UTAH CODE ANN. § 63L-6-102(3).

Together, these lands cover approximately 31.2 million acres of Utah,⁷ or an area roughly the size of the entire state of Mississippi.⁸

If public lands are transferred to state ownership, Utah may, under the TPLA, either retain or sell the land.⁹ If Utah sells the land, the state would retain five-percent of net sale proceeds and pay ninety-five-percent of the proceeds to the federal government. Utah's share of sale proceeds would be used to support public education.¹⁰ Utah may also retain the newly acquired lands, and statements by legislators signal this intent,¹¹ though fiscal realities may make that difficult.

How Utah would manage acquired public lands, however, is unclear. In 2015 the legislature enacted the Utah Public Land Management Act (UPLMA),¹² setting forth general management direction for the targeted lands. While modeled after the Federal Land Policy and Management Act (FLPMA)¹³ and touting multiple-use, sustained-yield management, the UPLMA deletes key directions from FLPMA's definition of "multiple use." For example, FLPMA directs the BLM to consider the "relative values of the resources and not necessarily . . . the combination of uses that will give the greatest economic return or the greatest unit output,"¹⁴ but no such direction is contained in the UPLMA. Rather, the UPLMA directs the state to manage each parcel of land to promote "principal or

⁷ UNIV. OF UTAH, UTAH STATE UNIV. & WEBER STATE UNIV., AN ANALYSIS OF A TRANSFER OF FEDERAL LANDS TO THE STATE OF UTAH xxv (2014). <http://publiclands.utah.gov/wp-content/uploads/2014/11/1.%20Land%20Transfer%20Analysis%20Final%20Report.pdf> [hereinafter ECONOMIC ANALYSIS].

⁸ Mississippi has a total area (land and water) of 48,432 square-miles, or 31 million acres. U.S. CENSUS BUREAU, DEP'T OF COM., 2012 STATISTICAL ABSTRACT OF THE UNITED STATES, tbl.358. <http://www2.census.gov/library/publications/2011/compendia/statab/131ed/tables/12s0358.xls>.

⁹ UTAH CODE ANN. § 63L-6-103(2).

¹⁰ UTAH CODE ANN. § 63L-6-103(3).

¹¹ See e.g., Amy Joi O'Donoghue, House GOP Reiterates Stance on Public Lands, DESERET NEWS (March 6, 2015) 2015 WLNR 6794754 (quoting Rep. Stratton as saying that "it makes little sense to 'sell off' those lands."); Brian Maffly, Officials Say Economic Outlook Good for Public Land Transfer, but Keep Study Under Wraps, SALT LAKE TRIB. (Nov. 19, 2014), www.sltrib.com/news/1847306-155/state-public-lands-utah-transfer-federal/ (quoting Rep. Stratton, "Over my dead body do we transfer these public lands to the private sector. We will remain a public lands state.").

¹² H.B. 276, 2016 Gen. Sess. (Utah) (codified at UTAH CODE ANN. §§ 63L-8-101 to 602, 63L-9-101 to 105).

¹³ 43 U.S.C. §§ 1701–1784 (2012).

¹⁴ 43 U.S.C. § 1702(c).

major uses of the land.”¹⁵ The UPLMA also omits the requirement to “take any action necessary to prevent unnecessary or undue degradation of the lands,” which is contained in FLPMA.¹⁶

B. Why the Transfer of Public Lands Act Matters

Although the TPLA’s deadline for a public land handover passed without federal acquiescence and Utah has not yet sued to force a transfer, Utah has spent millions preparing for such a fight. Other states are also following Utah’s lead, and federal bills to affect transfer to states are emerging.¹⁷ Transfer rhetoric is also inspiring fringe groups to take up arms against the federal government.¹⁸

1. The Proliferation of Bad Ideas

Inspired by the prospect of local control, increased commodity production, and the revenue windfall that many assume a state takeover would bring, ten of the eleven contiguous western states had, by late 2015, entertained some form of transfer legislation. Idaho joined Utah in calling

¹⁵H.B. 276, 2016 Gen. Sess. (Utah) (to be codified at UTAH CODE ANN. § 63L-8-103).

¹⁶ 43 U.S.C. § 1732(b). Utah also enacted the Utah Wilderness Act, UTAH CODE ANN. §§ 63L-7-1-1 to 109 (2014), but has yet to protect any land under it. Furthermore, the Act contains exemptions that could make designations illusory. “The governor may, within protected wilderness areas, authorize: . . . (b) the establishment and maintenance of reservoirs, water-conservation works, power projects, transmission lines, and other facilities needed in developing water resources, including road construction and essential maintenance.” *Id.* at § 63L-7-106(12). Comments by key state officials also reveal a clear goal of increasing commodity production. According to Kathleen Clarke, Director of Utah’s Public Land Policy Coordination Office, there is the “potential for variation in management scenario[s] that would invite significantly more revenue” if federal public lands are transferred to the state. Trib Talk: Transferring Federal Lands to Utah, YOUTUBE (May 22, 2014), <http://publiclands.utah.gov/kathleen-clarke-interviewed-for-trib-talk/>.

¹⁷ See e.g., H.R. 1484, 114th Cong. (2015) (to convey no less than 7.2 million acres of public land to Nevada); H.R. 3650, 114th Cong. (2015) (to transfer National Forest System lands to states).

¹⁸ See e.g., Criminal Indictment, *United States v. Bundy*, No. 2:16-CR-46 (D. Nev. Feb. 17, 2016), and Criminal Complaint, *United States v. Bundy et al.*, No. 3:16-mj-004-1-8 (D. Or. Jan. 16, 2016).

for a takeover of federal public lands.¹⁹ Montana,²⁰ Nevada,²¹ and Wyoming²² enacted legislation calling for transfer option studies. Nevada then enacted a joint resolution urging Congress to transfer public lands to the state.²³ The Arizona legislature demanded that the United States extinguish title to all public lands in Arizona and transfer them to the state, only to see the bill vetoed by the Governor.²⁴ Unable to override the Governor's veto, transfer movement supporters then tried to amend the Arizona Constitution to assert Arizona's claim of title to federal public lands. While the ballot measure was defeated soundly,²⁵ the Arizona legislature refused to give in, eventually enacting a bill "to examine processes to transfer, manage and dispose of federal lands within this state."²⁶

The Colorado Legislature defeated at least one joint resolution and three transfer bills.²⁷ The New Mexico Legislature fought off at least nine similar efforts.²⁸ Oregon thwarted four transfer bills,²⁹ and Washington

¹⁹ H.R. Con. Res. 22, 62nd Leg., 1st Reg. Sess., at 7 (Idaho 2013) (demanding the federal government to "imminently transfer title to all of the public lands within Idaho's borders directly to the State of Idaho.").

²⁰ S.J. Res. 15, 63rd Reg. Sess. (Mont. 2013).

²¹ A.B. 227, 77th Reg. Sess. (Nev. 2013) (creating a commission to study the public lands takeover).

²² H.R. 228, 62d Leg., Gen. Sess. (Wyo. 2013) (creating a commission to study the takeover of federal public lands).

²³ S.J. Res. 1, 78th Leg. (Nevada 2015).

²⁴ S.B. 1332, 50th Leg., 2d Reg. Sess. (Ariz. 2012); Letter from Janice K. Brewer, Governor of Ariz., to Ken Bennet, Sec'y of State (May 14, 2012), <https://www.azleg.gov/govlettr/50leg/2R/SB1332.pdf>.

²⁵ Arizona Proposition 120 State of Arizona Official Canvas 2012 General Election, ARIZ. SECRETARY OF STATE (2012), www.azsos.gov/election/2012/general/electioninformation.htm.

²⁶ H.B. 2658, 52d Leg., 1st Reg. Sess., at 1 (Ariz. 2015).

²⁷ S.J.R. 13-031, 69th Gen. Assemb., 1st Reg. Sess. (Colo. 2013); S.B. 13-142, 69th Gen. Assemb., 1st Reg. Sess. (Colo. 2013); S.B. 15-039, 70th Gen. Assemb., 1st Reg. Sess. (Colo. 2015); S.B. 15-232, 70th Gen. Assemb., 1st Reg. Sess. (Colo. 2015).

²⁸ H.B. 292, 51st Leg., 1st Sess. (N.M. 2013); S.B. 404, 51st Leg., 1st Sess. (N.M. 2013); S.J. Mem'l 53, 51st Leg., 1st Sess. (N.M. 2013); S.J. Mem'l 56, 51st Leg., 1st Sess. (N.M. 2013); S. Mem'l 93, 51st Leg., 1st Sess. (N.M. 2013); S. Mem'l 6, 52d Leg., 1st Sess. (N.M. 2015); H.B. 291, 52d Leg., 1st Sess. (N.M. 2015); S.B. 483, 52d Leg., 1st Sess. (N.M. 2015); H.B. 102, 51st Leg., 2d Sess. (N.M. 2014).

²⁹ H.R.J. Mem'l 13, 78th Leg. Assemb., Reg. Sess. (Or. 2015); S.J. Mem'l 5, 78th Leg. Assemb., Reg. Sess. (Or. 2015); H.B. 3444, 78th Gen. Sess. (Or. 2015); H.B. 3240, 78th Leg. Assemb., Reg. Sess. (Or. 2015).

blocked three transfer bills.³⁰ Of the eleven contiguous western states, only California has not taken up the fight. Even if unsuccessful, these efforts indicate the intensity of feeling involved.

Even distant states are joining the act. Georgia “encourage[s] the federal government to imminently extinguish both its title and government jurisdiction on the public lands that are held in trust by the United States and convey title and jurisdiction to willing States in which the federal public lands are located.”³¹ Similarly, South Carolina encourages the U.S. Congress to “coordinate the transfer of title to the Western states.”³²

The idea of transferring public lands to the states has also infused national politics, with the Republican National Committee lending its support³³ and takeover advocates introducing multiple bills during the 114th Congress that would transfer to the states title to or jurisdiction over public lands.³⁴ On the budgetary front, Senator Murkowski amended the Senate’s 2016 budget proposal to authorize funding of “initiatives to sell or transfer to, or exchange with, a State or local government any [enumerated] Federal land.”³⁵ In April 2015, Representatives Rob Bishop

³⁰ S.B. 5405, 64th Leg., Reg. Sess. (Wash. 2015); H.B. 1262, 64th Leg., Reg. Sess. (Wash. 2015); H.B. 1192, 64th Leg., Reg. Sess. (Wash. 2015); H.B. 2268, 63d Leg., Reg. Sess. (Wash. 2014).

³¹ H.R. Res. 106, 53d Leg., Reg. Sess. at 7 (Ga. 2015).

³² H.R. Res. 3552, 120th Gen. Assemb., Statewide Sess., at 1 (S.C. 2013-14).

³³ See REPUBLICAN CONVENTION, REPUBLICAN PLATFORM (2016), [https://prod-cdn-static.gop.com/media/documents/DRAFT_12_FINAL\[1\]-ben_1468872234.pdf](https://prod-cdn-static.gop.com/media/documents/DRAFT_12_FINAL[1]-ben_1468872234.pdf) (“Congress shall immediately pass universal legislation providing for a timely and orderly mechanism requiring the federal government to convey certain federally controlled public lands to states. We call upon all national and state leaders and representatives to exert their utmost power and influence to urge the transfer of those lands, identified in the review process, to all willing states for the benefit of the states and the nation as a whole.”). See also REPUBLICAN NATIONAL COMMITTEE, RESOLUTION IN SUPPORT OF WESTERN STATES TAKING BACK PUBLIC LANDS (2014), www.gop.com/wp-content/uploads/2014/01/resolution-in-support-of-western-states-taking-back-public-lands.pdf.

³⁴ See e.g., S. 361, 114th Cong. (2015) (directing the Secretary of the Interior to sell specified federal public lands); H.R. 435, 114th Cong. (2015) (same); H.R. 3650, 114th Cong. (2015) (requiring the Secretary of Agriculture, upon a request from a state, to sell that state up to 2 million acres of National Forest System land); H.R. 925, 114th Cong. (2015) (directing grants of public land to the state of Nevada and its counties, and requiring public land auctions); S. 472, 114th Cong. (2015) (same); H.R. 1484, 114th Cong. (2015) (directing the secretaries of Agriculture and the Interior to convey without consideration to the state of Nevada all interest in Forest Service and BLM lands); H.R. 3650, 114th Cong. (2015) (authorizing states to select and acquire National Forest System lands).

³⁵ S. Amend. 838 to S. Con. Res. 11, 114th Cong. (2015); 161 Cong. Rec. 1937 (March 25, 2015).

and Chris Stewart launched “a congressional team that will develop a legislative framework for transferring public lands to local ownership and control.”³⁶ As Congressman Bishop explains: “This group will explore legal and historical background in order to determine the best congressional action needed to return these lands to the rightful owners.”³⁷

While federal legislative efforts have thus far foundered, they represent an evolution in approach that may avoid many of the legal pitfalls discussed in Part III. With Republicans now in control of both houses of Congress and the White House, the prospect of passing such legislation has improved considerably.

2. Transfer Rhetoric Fuels Revolt

The potential for land transfer rhetoric to embolden fringe groups and spur violent action is a growing concern. As federal attorneys warned almost two decades ago:

The danger inherent in [ordinances exerting local control over federal land] is not that they are being enforced by the counties that pass them—indeed, most are not. The danger is that they encourage citizens to unlawful defiance of lawful federal land management directives. These acts of defiance threaten federal land managers as they carry out their statutorily mandated duties and may have serious ramifications, such as the imposition of fines and the loss of grazing permits for citizens who act on the legal theories touted by the movement.³⁸

Cliven Bundy relied on transfer arguments in justifying armed resistance to federal land management. Mr. Bundy had, since 1993, refused to pay federal grazing fees.³⁹ Following years of failed efforts to resolve the conflict and multiple court orders directing him to remove his cattle,⁴⁰ all of which were ignored, the district court authorized the federal

³⁶ Press Release, Congressman Chris Stewart, Reps. Stewart and Bishop Launch New Federal Land Action Group (Apr. 28, 2015), <https://stewart.house.gov/media-center/press-releases/rebs-stewart-and-bishop-launch-new-federal-land-action-group>.

³⁷ *Id.*

³⁸ Peter D. Coppelman, The Federal Government’s Response to the County Supremacy Movement, 12 NAT. RESOURCES & ENV’T 30, 30 (1997).

³⁹ *United States v. Bundy*, No. CV-S-98-532-JBR (RJJ), 1998 U.S. Dist. LEXIS 23835, at *1–*2 (D. Nev. Nov. 3, 1988).

⁴⁰ See *id.* at 17; Brief for Appellee, *United States v. Bundy*, 178 F.3d 1301 (1999) (No. 98-17293) 1999 WL 33654616 (9th Cir. 1999).

government to seize Bundy's trespassing cattle.⁴¹ The federal government began to roundup and auction off the trespassing cattle, with the proceeds set against Mr. Bundy's more than \$1 million in accumulated fees and fines.⁴² Mr. Bundy resisted, seeking support from militia groups,⁴³ and hundreds of armed supporters flocked to the Bundy compound.⁴⁴ The Department of the Interior backed down,⁴⁵ avoiding violence but emboldening anti-government sentiments; Senator Harry Reid (who criticized Mr. Bundy), BLM employees, and environmentalists all found themselves the recipients of death threats.⁴⁶

Mr. Bundy's justification for his actions is eerily similar to the arguments proffered by transfer activists. In 1998 Mr. Bundy contended that the federal government lacked authority over lands "inside an admitted state."⁴⁷ He also disputed the BLM's "constitutional authority" over public lands,⁴⁸ and dismissed federal efforts to regulate grazing on federal public lands as a "land grab,"⁴⁹ claiming that he possess a "vested right" to graze cattle on the public domain.⁵⁰ These arguments evolved and by 2014 could be summarized as: the Nevada Constitution's disclaimer of title to federal public lands carries no legal force; the Property Clause of the U.S. Constitution applies only to federal lands outside the state borders; the United States' exercise of ownership over federal lands

⁴¹ *United States v. Bundy*, No. 2:12-cv-0804-LDG-GWF, 2013 WL 3463610, at *3 (D. Nev. July 9, 2013).

⁴² Statement from Director of the BLM Neil Kornze on the Cattle Gather in Nevada, BUREAU OF LAND MGMT. (Apr. 12, 2014), https://web.archive.org/web/20170209062703/https://www.blm.gov/nv/st/en/info/newsroom/2014/april/national_office_statement.html.

⁴³ RYAN LENZ & MARK POTOK, S. POVERTY LAW CTR., *WAR IN THE WEST: THE BUNDY RANCH STANDOFF AND THE AMERICAN RADICAL RIGHT 9* (2014).

⁴⁴ Criminal Indictment, *supra* note 18, at 3.

⁴⁵ Statement from Director of the BLM Neil Kornze, *supra* note 42.

⁴⁶ Capitol Police Investigate Threats to Reid Amid Bundy Battle, GREENWIRE (Apr. 29, 2014), www.eenews.net/greenwire/stories/1059998621; Phil Taylor, With Death Threats, Nev. Conflict Highlights Dangerous Side of Public Land Management, GREENWIRE (Apr. 17, 2014), www.eenews.net/greenwire/stories/1059998078; Federal Worker Harassed at Gunpoint on Utah Highway, GREENWIRE (May 8, 2014), www.eenews.net/greenwire/stories/1059999230.

⁴⁷ *United States v Bundy*, No. CV-S-98-531-JBR (RJJ), 1998 U.S. Dist. LEXIS 23835, *13 (D. Nev. Nov. 3, 1988).

⁴⁸ *Id.* at *8.

⁴⁹ See Ted McDermott, Freedom Fighter, MISSOULA INDEPENDENT (June 12, 2014), <http://missoulanews.bigskypress.com/missoula/freedom-fighter/Content?oid=2054145>.

⁵⁰ *Bundy*, 1998 U.S. Dist. LEXIS 23835, *2.

violates the Equal Footing Doctrine; and Nevada state law excuses his trespass.⁵¹

The Bundy debacle demonstrates the danger of allowing misconceptions regarding ownership of public lands to continue. As the Department of Homeland Security explained:

[T]he belief among militia extremists that their threats and show of force against the BLM during the April Bunkerville standoff was a defining victory over government oppression is galvanizing some individuals—particularly militia extremists and violent lone offenders—to actively confront law enforcement officials, increasing the likelihood of violence. Additionally, this perceived success likely will embolden other militia extremists and like-minded lone offenders to attempt to replicate these confrontational tactics and force future armed standoffs with law enforcement and government officials during 2014.⁵²

On the heels of the Bunkerville fiasco, Phil Lyman, a County Commissioner from San Juan County, Utah organized an ATV ride up Recapture Canyon. Recapture Canyon, which includes public lands managed by the BLM, contains an unusually dense collection of Anasazi and Pueblo Indian sites dating back more than 2,000 years,⁵³ and it was closed to vehicle access in 2007 because of damage to archaeological resources.⁵⁴ Commissioner Lyman relied on transfer rhetoric to justify the ride, questioning federal ownership and jurisdiction over the lands, and firing up an angry audience:

It's a freedom that's been taken without our consent. . . . We have power and jurisdiction to do things independent of BLM. . . . As we approach independence day, let us contemplate what it means to be free and what we are willing to do to ensure that our children and their children inherit a free and flourishing San Juan County. . . . Remember that our

⁵¹ *United States v. Bundy*, No. 2:12-cv-0804-LDG-GWF, 2013 WL 3463610, *2 (D. Nev. July 9, 2013).

⁵² DEPARTMENT OF HOMELAND SECURITY, INTELLIGENCE ASSESSMENT, DOMESTIC VIOLENT EXTREMISTS POSE INCREASED THREAT TO GOVERNMENT OFFICIALS AND LAW ENFORCEMENT 1 (2014) (on file with author).

⁵³ Phil Taylor, Utah Official Plans Illegal ATV Ride Through BLM Canyon, GREENWIRE (Apr. 15, 2014), www.eenews.net/greenwire/stories/1059997933.

⁵⁴ *Id.*

revolutionary forefathers did not declare war, they declared independence, the war was only a consequence.⁵⁵

The Recapture Canyon ride attracted many of the same anti-federal militants who flocked to Mr. Bundy's defense, and dozens of ATV enthusiasts descended on the canyon for the ride.⁵⁶ While Commissioner Lyman and a local blogger were convicted of conspiracy charges related to the ride,⁵⁷ those convictions only exacerbated tensions.

Violence erupted when, in late 2014, militants descended on Burns, Oregon to protest the resentencing of two ranchers who had been convicted of arson after setting fire to public lands.⁵⁸ The district court had imposed sentences that were lighter than the required mandatory minimum sentence.⁵⁹ The court of appeals thus ordered resentencing in accordance with federal sentencing guidelines, and the two men were sent back to prison.⁶⁰

Protests over resentencing quickly morphed into a broader protest over public land management, and a small splinter group seized control of the nearby Malheur Wildlife Refuge. The militants refused to leave until the imprisoned ranchers were released,⁶¹ the refuge was handed over to adjacent private land owners, the county was given control of the refuge, and ranchers were given unfettered rights to graze cattle on refuge lands.⁶² The group's leader and spokesman Ammon Bundy "said the goal is to turn over federal land to local ranchers, loggers and miners."⁶³

⁵⁵ Id.

⁵⁶ Phil Taylor, BLM Pressured to Bring Illegal ATV Riders to Justice, GREENWIRE (May 13, 2014), www.eenews.net/greenwire/stories/1059999494.

⁵⁷ Judgment in a Criminal Case, *United States v. Lyman*, No. 2:14-CR-470 (D. Utah Oct. 22, 2015).

⁵⁸ Press Release, United States Att'y Off., Dist. of Or., Eastern Oregon Ranchers Convicted of Arson Resentenced to Five Years in Prison Oct. 7, 2015) (on file with authors).

⁵⁹ *United States v. Hammond*, 742 F.3d 880, 881 (9th Cir. 2014).

⁶⁰ Id. at 884–85.

⁶¹ The ranchers who had been convicted of arson quickly disavowed themselves from the militants, explaining that the militants did not speak for the ranchers. Oregon Ranchers Reject Cliven Bundy Family Occupation, CBS NEWS, www.cbsnews.com/news/oregon-ranchers-reject-cliven-bundy-family-occupation/ last updated Jan. 3, 2016).

⁶² Les Zaitz, Demands by Oregon Standoff Leaders Defy Logic and Law, Authorities Say, THE OREGONIAN (Jan. 23, 2016), www.oregonlive.com/oregon-standoff/2016/01/demands_by_oregon_refuge_occup.html.

⁶³ Les Zaitz, Militia Takes Over Malheur National Wildlife Refuge Headquarters, THE OREGONIAN (Jan. 2, 2016), www.oregonlive.com/pacific-northwest-news/index.ssf/2016/01/drama_in_burns_ends_with_quiet.html.

Tensions escalated. The federal government closed nearby USFS and BLM offices because of threats and intimidation against federal employees,⁶⁴ and local schools were shuttered.⁶⁵ On January 26, 2016, law enforcement officers attempted to arrest eight of the militants as they drove to a public meeting about the occupation. A vehicle driven by one of the militants attempted to avoid a police roadblock and became stuck in the snow. One of the armed militants then attempted to flee the vehicle, reached toward a weapon, and was shot and killed by Oregon State Patrol officers.⁶⁶

The Malheur occupiers, like transfer advocates, claim that the United States could not own the refuge lands because the Constitution does not permit the federal government to “forever retain the majority of land within a state.”⁶⁷ Mr. Bundy also justified his actions as a legitimate means of bringing questions of federal constitutional authority before a court. Citing legal work commissioned by the State of Utah, Mr. Bundy contended that “there was a legitimate legal basis for challenging the constitutionality of federal land ownership,” and that lacking the almost \$14 million Utah anticipated to litigate these claims, Mr. Bundy “identified an alternative way to raise the legal challenge.”⁶⁸ The tragic ending to the Malheur standoff reminds us of earlier warnings: a key danger of transfer rhetoric is its ability to embolden those who feel disenfranchised to commit violent acts.⁶⁹

⁶⁴ Criminal Complaint at 9–10, *United States v. Bundy*, No. 3:16-mj-00004 (D. Or. Jan. 16, 2016).

⁶⁵ Fedor Zarkhin, *Schools Near Oregon Standoff Site Reopen as Militant Occupation Continues*, THE OREGONIAN, www.oregonlive.com/oregon-standoff/2016/01/burns-area_schools_reopen_as_a.html#incart_river_index_topics (last updated Jan. 11, 2016).

⁶⁶ Robbie DiMesio, *Oregon Standoff: Amon Bundy in Custody, 1 Dead*, THE OREGONIAN, www.oregonlive.com/oregon-standoff/2016/01/oregon_standoff_ammon_bundy_re.html#incart_river_index_topics (last updated Jan. 26, 2016).

⁶⁷ Order Resolving Round One Motions on the Pleadings, *United States v. Bundy*, 195 F. Supp. 3d 1170 (D. Oregon, June 3, 2016) (No. 3:16-cr-00051-BR). See also, Defendant Amon Bundy’s Motion to Dismiss for Lack of Subject Matter Jurisdiction at 6–7, *United States v. Bundy*, 195 F. Supp. 3d 1170 (D. Oregon May 9, 2016) (No. 3:16-cr-00051-BR), ECF No. 527.

⁶⁸ Defendant Ammon Bundy’s Motion to Dismiss for Lack of Subject Matter Jurisdiction, *supra* note 67, at 8–9.

⁶⁹ See Peter D. Coppelman, *supra* note 38, at 30.

II. A BRIEF HISTORY OF THE PUBLIC LANDS

A historic perspective regarding western public lands is important because many “modern problems in public land law . . . grow directly out of that historical legacy. These stem largely from the patchwork, haphazard character of federal disposal policies, and the sometimes dizzying patterns of land ownership that have resulted.”⁷⁰

A. Acquisition of the Public Domain

The manner of land acquisition, the way in which newly acquired territories were governed, and the path to statehood differed markedly between east and west. The original thirteen states’ title to land stems from the states’ victory in the Revolutionary War.⁷¹ The original thirteen states possessed undiminished territorial sovereignty until they agreed to form a central government and cede specified lands and powers to that government.⁷²

Cession to the federal government occurred because landlocked states feared that states with claims to the western frontier would have disproportionate political and economic power.⁷³ The lands ceded to the federal government were conveyed expecting that the federal government would sell some lands to pay off the states’ war debts—debts that the federal government assumed in return for the grants from the states.⁷⁴ New states would be created out of the western frontier, with some lands passing out of federal ownership and fueling our westward expansion.⁷⁵

⁷⁰ GEORGE CAMERON COGGINS ET AL., *FEDERAL PUBLIC LAND AND RESOURCES LAW* 147 (5th ed. 2002).

⁷¹ See Definitive Treaty of Peace and Friendship, His Britannic Majesty-U.S., art. I, Sept. 3, 1783, 1 Malloy 586. See also, *Martin v. Waddell*, 41 U.S. 367, 410 (1842) (“when the revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the constitution to the general government.”).

⁷² See *Cummings v. Missouri*, 71 U.S. 277, 318–19 (1866).

⁷³ See, PAUL W. GATES, *PUB. LAND. L. REV. COMM’N, HISTORY OF PUBLIC LAND LAW DEVELOPMENT*, Ch. III (1968).

⁷⁴ Michael C. Blumm & Oliver Jamin, *The Property Clause and its Discontent: Lessons from the Malheur Occupation* 43 *ECOLOGY L. Q.* 781, 794–96 (2016).

⁷⁵ *Id.* at 796.

Farther west, Spain asserted title to much of the Southwest based on its conquest of North America's first inhabitants.⁷⁶ In 1821 Mexico won the Mexican War of Independence, gaining its independence from Spain.⁷⁷ Mexico held title until 1848, when the Treaty of Guadalupe Hidalgo ended the Mexican-American War.⁷⁸ In return for cessation of hostilities and \$15 million, Mexico conveyed to the United States title to approximately 339 million acres (529,000 square-miles) of land.⁷⁹ Five years after ratification of the Treaty of Guadalupe Hidalgo, the United States purchased an additional 19 million acres (29,670 square-miles) from Mexico, establishing the border between the United States and Mexico that exists today.⁸⁰

The land obtained from Mexico was obtained with federal blood and treasure, and when Mexico transferred title to land, it transferred it to the federal government of the United States.⁸¹ Similarly, all of Washington, Oregon, and Idaho, as well as portions of Montana and Wyoming, were acquired from Great Britain in 1846 as part of the Oregon Compromise.⁸² The remainder of Montana, Wyoming, and a large portion of Colorado (among other states) was acquired from France in 1803, via the Louisiana Purchase.⁸³

⁷⁶ See *Johnson v. McIntosh*, 21 U.S. 543, 545 (1821). See also, JOSEPH STORY, 1 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 2-3 (1833) (“There is no doubt, that the Indian tribes, inhabiting this continent at the time of its discovery, maintained a claim to the exclusive possession and occupancy of the territory within their respective limits, as sovereigns and absolute proprietors of the soil.”).

⁷⁷ Title was claimed based on the right of discovery. STORY, *supra* note 76, bk. 1, ch. 1, § 2, at 4. Spain and Mexico signed the Treaty of Cordoba on August 24, 1821, ending the Mexican War of Independence. See TIMOTHY J. HENDERSON, *THE MEXICAN WAR OF INDEPENDENCE 177–78* (2010).

⁷⁸ Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, Mex.-U.S., Feb. 2, 1848, 9 Stat. 922 [hereinafter Treaty of Guadalupe Hidalgo].

⁷⁹ See *id.* (discussing financial payment); see also, BUREAU OF LAND MGMT., DEPT. OF THE INTERIOR, PUBLIC LAND STATISTICS 2015, tbl.1-1 (2016) (discussing acreage).

⁸⁰ See Gadsden Treaty, U.S.-Mex., Dec. 30, 1853, 10 Stat. 1031 (1854) (as amended and ratified); see also PUBLIC LAND STATISTICS 2015, *supra* note 79, at tbl.1-1 (discussing acreage).

⁸¹ Treaty of Guadalupe Hidalgo, *supra* note 78. See also, U.S. CONST. art. 2, § 2, cl. 2 (granting the power to enter into treaties with foreign powers exclusively to the federal government).

⁸² See Treaty with Great Britain in Regard to the Limits Westward of the Rocky Mountains, Gr. Brit.-U.S., June 15, 1846, 9 Stat. 869.

⁸³ See Treaty Between the United States and the French Republic, Fr.-U.S., Apr. 30, 1803, 8 Stat. 200.

B. Federal Land Ownership

Once this land was acquired by the federal government, Congress created federal territories and set forth the manner in which those territories would be governed.⁸⁴ As the Supreme Court explained recently, “U.S. Territories . . . are not sovereigns distinct from the United States.”⁸⁵ Rather, territories are subsidiary to the federal government, depending on the federal government for territorial powers of self-governance.⁸⁶ In the western territories the territorial governor, territorial secretary, territorial supreme court justices, territorial attorney, and the territorial marshal were all federal appointees.⁸⁷ Territorial residents had the right to elect a “delegate” to represent them in the U.S. House of Representatives.⁸⁸ But these delegates could not vote,⁸⁹ and territorial residents did not have representation in the U.S. Senate.

Congress anticipated that territorial citizens would form governments of their own and become states.⁹⁰ This transition, however, was not self-effectuating.⁹¹ Normally, Congress passed statehood enabling acts; territorial governments drafted a constitution in accordance with the statehood enabling acts; and eligible voters within the territory adopted the draft constitution. Once these steps were complete, Congress passed legislation admitting the latent state into the Union.⁹² Newly minted states

⁸⁴ See e.g., Act of Sept. 9, 1850, ch. 51, 9 Stat. 453 (establishing a territorial government for Utah). See also *United States v. Nye County, Nevada*, 920 F. Supp. 1108, 1110 (D. Nev. 1996) (noting that lands were ceded to the United States).

⁸⁵ *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1866 (2016).

⁸⁶ *Id.*

⁸⁷ See e.g., Act of Sept. 9, 1850, at 456.

⁸⁸ *Id.* at 457.

⁸⁹ Act of Mar. 3, 1817, ch. 42, 3 Stat. 363, § 1 (regulating the territories of the United States and their electing delegates to Congress). See also, CHRISTOPHER M. DAVIS, CONG. RESEARCH SERV., *DELEGATES TO THE U.S. CONGRESS: HISTORY AND CURRENT STATUS* 1-2 (2015) (discussing delegates under the Northwest Ordinance).

⁹⁰ See, e.g., Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 51 n.(a), art. 5 (1789) (providing for the government of the territory north-west of the Ohio River) (indicating that territories with a free population of 60,000 could obtain statehood).

⁹¹ Even Vermont, the first state admitted to the new Union, had to petition for and be granted statehood. See, Act of Feb. 18, 1791, ch. 7, 1 Stat. 191 (admitting the state of Vermont into the Union).

⁹² See, e.g., Act of Feb. 22, 1889, ch. 180, 25 Stat. 676 [hereinafter *Montana and Washington Enabling Act*] (providing for the division of Dakota into two States, to enable the people of North Dakota, South Dakota, Montana, and Washington to form constitutions and State governments and to be admitted into the Union on an equal footing with the original states, and to make donations of public land to such States).

then elected government officers, including a governor, and representatives to the state legislature.⁹³ Residents of the newly admitted states also elected senators and representatives for the upcoming session of Congress.⁹⁴ In short, citizens of the new state would assume all the political rights and sovereignty afforded to residents of then existing states.

The TPLA does not assert that Utah held original title to the land at issue, but instead speaks of the federal government's purported obligation to transfer title to federal public lands to the state. Pundits,⁹⁵ politicians,⁹⁶ and even some scholars,⁹⁷ however, characterize the transfer movement as an effort to "take back" lands that once belonged to the state. Utah, however, did not exist as a state until 1896 when, following satisfaction of its enabling act obligations, it was proclaimed as such by President Grover Cleveland.⁹⁸ As Supreme Court Justice Joseph Story explained:

As the general government possesses the right to acquire territory, either by conquest or by treaty, it would seem to follow, as an inevitable consequence, that it possesses the power to govern what it has so acquired. The territory does not, when so acquired, become entitled to self government, and it is not subject to the jurisdiction of the State. It must, consequently, be under the dominion and jurisdiction of the Union, or it would be without any government at all.⁹⁹

⁹³ Id. at 679.

⁹⁴ See, e.g., id. at 683.

⁹⁵ See, e.g., Am. Lands Council, Ken Ivory on Glen Beck Radio Discussing the Transfer of Public Lands, YOUTUBE (April 21, 2014), <https://www.youtube.com/watch?v=WD115zHV2Dk> (discussing how to "get the federal lands returned to the states").

⁹⁶ Id. See also U.S. Senate Candidates Differ on Public Land Philosophy, BILLINGS GAZETTE (May 7, 2014), http://billingsgazette.com/news/opinion/guest/u-s-senate-candidates-differ-on-public-lands-philosophy/article_baff64c5-18ee-5425-95ea-0218c9533acc.html ("It's time to return these lands to Montana so that we can manage our forests, protect private property, implement responsible and sustainable harvest programs, and reap the economic benefits that come from well-managed lands.").

⁹⁷ See Donald J. Kochan, Public Lands and the Federal Government's Compact-Based "Duty to Dispose": A Case Study of Utah's H.B. 148 — The Transfer of Public Lands Act, 2013 B.Y.U. L. REV. 1133, 1150–51 (2014) (claiming the federal government obtained the land at statehood); Spencer Driscoll, Note, Utah's Enabling Act and Congress's Enclave Clause Authority: Federalism Implications of a Renewed State Sovereignty Movement, 2012 B.Y.U. L. REV. 999 (2012) (same).

⁹⁸ Presidential Proclamation of January 4, 1896, 29 Stat. 876 (1896).

⁹⁹ 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1324 (1880). Justice Story reached the same conclusion in the first edition of his

President Buchanan pulled no punches about federal ownership and control of public lands when he ordered the army into Salt Lake City to quell secessionist efforts.

You have settled upon territory which lies geographically in the heart of the Union. The land you live upon was purchased by the United States and paid for out of their treasury. The proprietary right and title to it is in them, and not in you. Utah is bounded on every side by States and Territories whose people are true to the Union. It is absurd to believe that they will or can permit you to erect in their midst a government of your own, not only independent of the authority which they all acknowledge, but hostile to them and their interests.¹⁰⁰

While influential politicians have long recognized that states cannot “take back” that which was never theirs,¹⁰¹ those who ignore history or seek political advantage from populist fervor can drown out more reasoned voices. Richard Lamm, former Governor of Colorado, distilled the situation nicely more than thirty years ago:

The West had no conceivable legal claim to land that had never been its own. Legally the West was wrong, but the questions it asked about its place on the public domain went far beyond legalities into shadowy areas of ethics and morality where answers did not come so easily. And in those areas western confusion and protest took on more validity.¹⁰²

COMMENTARIES. See 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1318 (1833) (reaching the same conclusion).

¹⁰⁰ Pres. Proc. No. 50, 11 Stat. 796 (1858) (respecting the rebellion and Mormon troubles in the territory of Utah).

¹⁰¹ Robert Bennett, Utah Unlikely to ‘Take Back’ Federal Lands, DESERET NEWS (Feb. 17, 2014), <https://www.deseretnews.com/article/865596679/Utah-unlikely-to-take-back-federal-lands.html> (“I don’t see merit in the argument that the federal government now has a legal obligation to give [Utah] ‘back’ something they never owned.”). See also SCOTT M. MATHESON, OUT OF BALANCE 126 (1986) (former Utah Governor Matheson states that he thought earlier state efforts to seize federal land were legally flawed and unlikely to succeed). Paul Van Dam, Op-Ed: Attorneys General Know What They’re Talking About on Public Lands, SALT LAKE TRIB. (Oct. 14, 2016), <http://archive.sltrib.com/printfriendly.php?id=4468079&itype=CMSID>.

¹⁰² RICHARD D. LAMM & MICHAEL MCCARTHY, THE ANGRY WEST: A VULNERABLE LAND AND ITS FUTURE 215 (1982). Former Utah Governor Scott Matheson concurred in his colleague’s assessment, stating that he had “little confidence in the legal arguments of the Sagebrush Rebels.” MATHESON, supra note 101, at 126 (1986).

C. Federal Authority Over Land Pursuant to the Property Clause

The federal government's authority over the lands it acquired is clear. The Constitution's Property Clause states that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory and other Property belonging to the United States."¹⁰³

Prior sagebrush rebels and some of today's transfer advocates¹⁰⁴ contend that the Property Clause granted the federal government only the power to "dispose of" land, leaving the United States without authority to retain lands in private ownership.¹⁰⁵ The Property Clause's power to "dispose of" property, however, is not an obligation to give away property. While "dispose of" includes the power "to part with," "to alienate," and "to give away," dispose of also includes the power "to direct the course of a thing," "to direct what to do or what course to pursue" and the power "to use or employ"—all of which impliedly include the power to retain.¹⁰⁶ Moreover, Congress has an "absolute right" to decide upon the disposition of federal land and "[n]o State legislation can interfere with this right or embarrass its exercise."¹⁰⁷

More than a century ago, the Supreme Court repelled an attack on the nascent National Forest System, concluding that the federal government could retain public lands for broad national benefits, and that it could do so indefinitely. In *Light v. United States*,¹⁰⁸ a Colorado resident who had

¹⁰³ U.S. CONST. art. IV, § 2. "The term territory, as here used, is merely descriptive of one kind of property; and is equivalent to the word lands. And Congress has the same power over it as over any other property belonging to the United States." *United States v. Gratiot*, 39 U.S. 526, 537 (1840).

¹⁰⁴ See PETER MICHAEL ET AL., CONFERENCE OF WESTERN ATTORNEYS GENERAL, REPORT OF THE PUBLIC LANDS SUBCOMMITTEE (2016) [hereinafter CONFERENCE OF WESTERN ATTORNEYS GENERAL] (discussing contemporary assertions). See also Defendant Ammon Bundy's Motion to Dismiss for Lack of Subject Matter Jurisdiction at 21, *United States v. Bundy*, 195 F. Supp. 3d 1170 (D. Or. July 20, 2016) (No. 3:16-cr- 00051-BR), ECF No. 527.

¹⁰⁵ See e.g., *United States v. Nye*, 920 F. Supp. 1108, 1117 (D. Nev. 1996) (discussing claim that the Constitution vests in Congress only the power to dispose of lands).

¹⁰⁶ 1 WEBSTER'S AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE: INTENDED TO EXHIBIT (1828) "We speak of the disposition of the infantry and cavalry of an army; the disposition of the trees in an orchard; the disposition of the several parts of an edifice, of the parts of a discourse, or of the figures in painting." *Disposition*, id. See also, *Dispose*, 1 ENGLISH A DICTIONARY OF WORDS AND PHRASES USED IN ANCIENT AND MODERN LAW 293 (1899) (defining "dispose" as including "to determine").

¹⁰⁷ *Gibson v. Chouteau*, 80 U.S. 92, 99 (1871) (upholding claim to land by a federal patent holder against a competing claim reliant on state law).

¹⁰⁸ 220 U.S. 523 (1911).

been enjoined from grazing cattle on National Forest System lands attacked the injunction by arguing that Congress could not withdraw public lands from settlement absent state consent. The Supreme Court soundly rejected the argument, holding that the United States owns the public lands “and has made Congress the principal agent to dispose of property,” which includes the right to “sell or withhold [public lands] from sale.”¹⁰⁹ As an owner and sovereign, “the United States can prohibit absolutely or fix terms on which its property can be used. As it can withhold or reserve the land it can do so indefinitely.”¹¹⁰

Light is but one in a long line of cases holding that “inclusion within a State of lands of the United States does not take from Congress the power to control their occupancy and use . . . and to prescribe the conditions upon which others may obtain rights in them.”¹¹¹ With respect to managing wildlife on federal public lands, a function normally ascribed to the states, the Supreme Court opined that “[t]he argument appears to be that Congress could obtain exclusive legislative jurisdiction over the public lands in the State only by state consent, and that in the absence of such consent Congress lacks the power to act contrary to state law. This argument is without merit.”¹¹² The breadth of the Property Clause is beyond dispute, and broad federal authority under the Property Clause comports with the intent of our nation’s founding fathers.¹¹³

Indeed, attorneys for Utah and Wyoming recognize the futility of the argument. In Utah, the Office of Legislative Research and General Counsel appended a review note to the initial draft of the TPLA, explaining that demanding transfer of title to the public lands to Utah, “would interfere with Congress’ power to dispose of public lands. Thus, that requirement, and any attempt by Utah in the future to enforce the requirement, have a high probability of being declared

¹⁰⁹ *Id.* at 536 (internal citations and quotations omitted).

¹¹⁰ *Id.*

¹¹¹ *Utah Power & Light Co. v. United States*, 243 U.S. 389, 403–05 (1917) (holding that the Enclave Clause does not require cession of state jurisdiction over federal lands and that the United States retains authority under the Property Clause).

¹¹² *Kleppe v. New Mexico*, 426 U.S. 529, 541 (1976). According to Fischman & Williamson, *Kleppe* signals that the Supreme Court will rely primarily on the legislative process to determine the limits of the Property Clause of the U.S. Constitution. Fischman & Williamson, *supra* note 4.

¹¹³ Peter A. Appel, *The Power of Congress “Without Limitation”: The Property Clause and Federal Regulation of Private Property*, 86 *MINN. L. REV.* 1, 16 (2001).

unconstitutional.”¹¹⁴ The Office of the Wyoming Attorney General reached a similar conclusion, opining that “because the legal bases for Utah’s demands depend upon a repeatedly rejected reading of the United States Constitution and a strained interpretation of Utah’s statehood act, Utah’s claims will likely fail in court.”¹¹⁵

The occupiers of the Malheur National Wildlife Refuge also contended that the court lacked jurisdiction because “the Constitution does not permit the federal government to ‘forever retain the majority of land within a State’ and, thus, to exercise its current ownership over federal lands including the [Refuge].”¹¹⁶ The court held otherwise, explaining that the federal government never relinquished title to the lands at issue, and that “ ‘Oregon never had any claim to sovereignty prior to its admission to the Union,’ and, therefore, ‘it had no basis to claim independence or ownership of land.’ ”¹¹⁷ Since the land at issue remained U.S. property, the court then concluded that “the United States’ exercise of regulatory jurisdiction over the [refuge] is authorized by the Property Clause [of the U.S. Constitution], and, therefore, this Court has jurisdiction over the charged offenses that allegedly took place on the [refuge].”¹¹⁸

With ownership of and control over the public domain securely in federal hands, western states can only claim the right to title to federal public lands by demonstrating a legal obligation requiring the federal government to convey public land to the states. Before turning to that issue, we must first understand how public lands have been treated over time.

D. Federal Disposal of the Public Domain

The federal government encouraged westward expansion by selling or granting land to homesteaders, miners, ranchers, railroads, and others—conveying over 512 million acres (over 800,000 square-miles) of land into private ownership.¹¹⁹ The federal government made similarly expansive grants to the new states. Western states were granted the right to title to

¹¹⁴ H.B. 148, 59 Leg. Gen. Sess. advisory committee’s note (Utah 2012) (as introduced).

¹¹⁵ Memorandum from Jeremiah I. Williamson, Assistant Attorney Gen., to Jeremiah L. Rieman, Nat. Res. Policy Advisor (May 4, 2012) (on file with author).

¹¹⁶ Order Resolving Round One Motions on the Pleadings, *supra* note 67, at 11.

¹¹⁷ *Id.* at 14 (quoting 48 Or. Op. Atty. Gen. 1, 3 (1995), 1995 WL 400487).

¹¹⁸ Order Resolving Round One Motions on the Pleadings, *supra* note 67, at 15.

¹¹⁹ PUBLIC LAND STATISTICS 2015, *supra* note 79, at 5.

specified federal lands upon statehood. Granted lands could be leased or sold by the states, generating revenue to support purposes such as funding public schools and universities, hospitals, and construction of a state capitol.¹²⁰ Statehood grants were made to each of the eleven contiguous western states and ranged from 2.7 million acres in Nevada to 12.4 million acres in New Mexico.¹²¹ See Table 1.

Table 1 – Acres of Federal Land Granted to Western States¹²²

State	Public Schools	Public Buildings	Colleges & Universities	Other	Total
Arizona	8,093,156	100,000	396,000	1,900,000	10,489,156
California	5,534,293	6,400	196,080	2,693,965	8,430,738
Colorado	3,685,618	32,000	137,680	578,080	4,433,378
Idaho	2,963,698	32,000	186,080	482,187	3,663,965
Montana	5,198,258	182,000	186,080	463,120	6,029,458
Nevada	2,061,967	12,800	136,080	512,800	2,723,647
New Mexico	8,711,324	132,000	562,702	3,040,000	12,446,026
Oregon	3,399,360	6,400	136,080	3,543,402	7,085,242
Utah	5,844,196	64,000	356,080	1,150,000	7,414,276
Washington	2,376,391	132,000	136,080	400,000	3,044,471
Wyoming	3,472,872	107,000	136,080	532,480	4,248,432
Total	51,341,133	806,600	2,565,022	15,296,034	70,008,789

And disposal continues. Even under modern law dictating that “public lands be retained in Federal ownership, unless . . . it is determined that disposal of a particular parcel will serve the national interest,”¹²³ the BLM still managed to dispose of over 24 million acres of land between 1990 and 2010—more land than the entire state of Indiana.¹²⁴

¹²⁰ See, e.g., Act of July 16, 1894, ch. 138, 28 Stat. 107 [hereinafter the Utah Enabling Act] (enabling the people of Utah to form a constitution, to form a state government, and to be admitted into the Union on equal footing with the original states).

¹²¹ GATES, *supra* note 73, at 804–05.

¹²² *Id.* at 804–05.

¹²³ 43 U.S.C. § 1701(a)(1) (2012).

¹²⁴ ROSS W. GORTE ET AL., CONG. RES. SERV., R42346, FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 16 tbl.3 (2012). Congress also continues to dispose of public land when doing so is in the public interest. See e.g., Pub. L. No. 112-138, 26 Stat. 388 (2012) (granting land to the town of Alta, Utah), Pub. L. No. 106-460, 114 Stat. 1988 (2000) (granting land to the Landusky, Montana School District), and Pub. L. No. 103-346, 108 Stat. 3131 (1994) (granting land to the City of Imperial Beach, California).

E. Federal Retention of the Public Domain

While federal land policy long favored disposal, disposal was always balanced against federal land retention needs. It is also true that the low economic value of some lands that were available to miners, loggers, and homesteaders hampered disposal efforts.

The federal government has a long history of retaining land in federal ownership. Beginning in 1785, Congress reserved to the federal government four sections of land in each township; Congress also reserved one additional section to support the maintenance of schools in that township, “a certain proportion equal to one seventh of all the land surveyed . . . to be distributed to the late continental army,” and a one-third interest in gold, silver, lead, and copper found on federal land.¹²⁵ Since at least 1786, the federal government has set aside portions of the public domain as a homeland for Native Americans.¹²⁶ In 1796, Congress reserved to the federal government salt springs and adjacent lands.¹²⁷ Withdrawals for what would become National Parks began as early as 1832.¹²⁸ In 1891, Congress authorized Presidents to withdraw National Forests from disposal,¹²⁹ leading to reservations of millions of additional acres of land. In 1920, the Mineral Leasing Act directed that hydrocarbons

¹²⁵ CURTIS H. LINDLEY, *A TREATISE ON THE AMERICAN LAW RELATING TO MINES AND MINERAL LANDS WITHIN THE PUBLIC LAND STATES AND TERRITORIES AND GOVERNING THE ACQUISITION AND ENJOYMENT OF MINING AND ENJOYMENT OF MINING RIGHTS IN LANDS OF THE PUBLIC DOMAIN* 36 (1897). See also, *An Ordinance for Ascertaining the Mode of Disposing of Lands in the Western Territories* (May 20, 1785), in *United States Continental Congress and Continental Congress Broadside Collection*, www.loc.gov/resource/bdsdcc.11201/?st=gallery.

¹²⁶ See *Treaty with the Choctaws*, art. 2-3, Jan. 3, 1786, 7 Stat. 21 (allocating lands “within the limits of the United States of America” and which are “under protection of the United States of America” to the Choctaw Nation). Prior to ratification of the U.S. Constitution and formation of a unified federal government, individual colonies set aside land for Native Americans, so federal reservation policy is an extension of even older colonial policies. COHEN’S *HANDBOOK OF FEDERAL INDIAN LAW* § 1.02[1] (Nell Jessup Newton ed., 2012).

¹²⁷ Act of May 18, 1796, ch. 29, 1 Stat. 464, 466 (providing for the sale of the lands of the United States in the territory northwest of the Ohio River and above the mouth of the Kentucky River).

¹²⁸ See, e.g., Act of Apr. 20, 1832, ch. 70, 4 Stat. 505 (authorizing the governor of the territory of Arkansas to lease the salt springs in said territory, and for other purposes); Act of Mar. 1, 1872, ch. 24, 17 Stat. 32 (setting apart a certain tract of land lying near the headwaters of the Yellowstone River as a public park).

¹²⁹ Act of Mar. 3, 1891, ch. 561, 26 Stat. 1095, 1103 (creating forest reserves, which later became national forests).

and other valuable minerals be retained in federal ownership and be made available for development only through government issued leases.¹³⁰ In 1934, Congress enacted the Taylor Grazing Act,¹³¹ effectively withdrawing “all public lands within the exterior boundaries of such a proposed grazing district from all forms of entry and settlement.”¹³²

As the Idaho Office of the Attorney General recently opined, the disparity in federal land ownership between the East and the West is also at least partly attributable to “the fact that many of the lands in Idaho were not suitable for homesteading.”¹³³ Between 1822 and 1884 the federal government made almost 408 million acres of public land available for sale,¹³⁴ only forty-four percent of which was sold.¹³⁵ As of 1905, there were still almost 450 million acres of the United States that remained unreserved and open to settlement.¹³⁶ Of these acres, over 418 million acres were in the eleven contiguous western states.¹³⁷ The lands that remained were the most difficult from which to earn a living, as settlers selected the best and most valuable lands first.¹³⁸

The federal government tried to give additional public land to the states, but many states refused. In 1929, President Hoover addressed western governors, declaring that “an end should be put to federal landlordism and bureaucracy, and that save for certain mineral rights, the remaining public lands should be ceded to the states in which they lay.”¹³⁹ President Hoover then convened a committee to investigate turning over the public domain to the states. The committee “gave overwhelming

¹³⁰ Mineral Leasing Act of 1920, ch. 85, 41 Stat. 437 (codified as amended at 43 U.S.C. §§ 181-287 (2012)).

¹³¹ Taylor Grazing Act, ch. 865, 48 Stat. 1269 (1934) (codified as amended at 43 U.S.C. §§ 315-315r (2012)).

¹³² 43 U.S.C. § 315 (2012).

¹³³ Letter from Steven W. Strack, Assistant Att’y Gen., to Ilana Rubel, Idaho Representative (Mar. 14, 2016), http://magicvalley.com/deputy-ag-strack-opinion/pdf_edae2d78-566c-5428-904b-159426e37a44.html. As the letter correctly notes, the shift in federal policy from disposal to reservation was also a factor. *Id.*

¹³⁴ GATES, *supra* note 73, at 802–03.

¹³⁵ *Id.* at 802.

¹³⁶ *Id.* at 502.

¹³⁷ REPORT OF THE COMMISSIONER OF THE GENERAL LAND OFFICE, 59th Cong. 1st Sess., H. Doc. 4958 5/2, 383 (1905).

¹³⁸ Gary M. Anderson & Dolores T. Martin, The Public Domain and Nineteenth Century Transfer Policy, 6 CATO J. 905, 910 (1987).

¹³⁹ ROY M. ROBBINS, OUR LANDED HERITAGE: THE PUBLIC DOMAIN, 1776-1970 413 (1976).

support” to ceding the public domain to the states.¹⁴⁰ Although Congress drafted legislation giving public lands to the states,¹⁴¹ those bills died for lack of state support.¹⁴² States were reluctant to acquire the public domain because the proposed grants excluded sub-surface minerals, and states feared that if they accepted the land they would lose federal reclamation funds, mineral revenue, and highway funds while incurring increasing administrative costs.¹⁴³

Physical realities also played an important role in western settlement. Average annual precipitation in Boise, Idaho, and Salt Lake City, Utah, for example, average just 11.6 and 18.6 inches respectively. By comparison, annual precipitation in Springfield, Missouri and Columbia, South Carolina average 45.5 and 44.3 inches annually.¹⁴⁴ It was thus no surprise that federal initiatives like the Homestead Act failed in the West.

[T]he provisions of the Homestead Act were totally inapplicable to arid-region conditions. A 160-acre tract was much too small for grazing—the only practicable use to which the land could be put without irrigation. Acquisition and improvement of land for irrigation were not possible without expenditures of capital which were infinitely beyond the means of the homesteader. . . . [Similarly, t]he Desert Land Act of 1877 permitted one, upon a small payment, to acquire up to 640 acres of arid land, provided he would irrigate it—a virtual impossibility.¹⁴⁵

Even in fertile river valleys, rapid snowmelt could cause devastating floods, and rugged topography combined with the cost of reservoir and irrigation system development slowed development. Until the 1920s and

¹⁴⁰ *Id.* at 415.

¹⁴¹ See S. 17, 72nd Cong., 1st Sess. (1932), S. 2272, 72nd Cong., 2d Sess. (1932), and S. 4060, 72nd Cong., 2d Sess. (1932).

¹⁴² Don B. Colton, *Control of the Public Domain: A National or State Function?*, N.Y. TIMES, Apr. 10, 1932, pp. 1, 11 (“if I sense general Western sentiment correctly, and I have had an excellent opportunity to observe it, the West is not in favor of such legislation.”).

¹⁴³ UTAH CONST. DEF. COUNCIL, REPORT ON UTAH’S TRANSFER OF PUBLIC LANDS ACT H.B. 148, 17-19 (2012) (hereinafter CDC REPORT) (quoting George Dern, then Governor of Utah); see also ROBBINS, *supra* note 139, at 416–17.

¹⁴⁴ Archive of U.S. climate data by state from Your Weather Service, U.S. CLIMATE DATA, usclimatedata.com (last visited Oct. 16, 2017).

¹⁴⁵ 4 WATER & WATER RIGHTS 41.02 (Amy K. Kelley, ed. 3d ed. 2016) (internal citations omitted).

the birth of large federal irrigation projects, much of the Intermountain West was simply too dry for productive homesteading and agriculture.¹⁴⁶

Disposal laws applied equally across the country, but the western landscape was simply less hospitable to settlers. To this day, land ownership reflects these realities: on average, western counties with more arable land have a higher percentage of land in private ownership than counties where arable land is in short supply.¹⁴⁷

III. LEGAL ARGUMENTS REGARDING PUBLIC LAND DISPOSAL

Because the TPLA was passed before the legal theories behind it were fully developed, making sense of the TPLA's legal claims can be complicated. While the TPLA demands that the United States give 31.2 million acres of land to Utah, weak claims to title and strong enabling act disclaimers have forced transfer advocates to pivot toward demanding public land "disposal," potentially to a broader suite of recipients. Six arguments have been proffered in favor of either granting land to the states or compelling the federal government to dispose of the public domain. These arguments are addressed in turn.

A. Equal Footing / Equal Sovereignty

The equal footing doctrine holds that "all states are admitted to the Union with the same attributes of sovereignty (i.e., on equal footing) as the original thirteen states."¹⁴⁸ The acts enabling admission of the western

¹⁴⁶ Groundwater development was even more problematic, with limited development occurring in the Southwest or the High Plains until the 1930s and '40s, when the combination of high capacity pumps and rural electrification made widespread groundwater development feasible. Ground-Water Resources for the Future, Desert Basins of the Southwest, U.S. GEOLOGICAL SURV. (Aug. 2000), pubs.usgs.gov/fs/0086-00/report.pdf; Steven L. Rhodes & Samuel E. Wheeler, Rural Electrification and Irrigation in the U.S. High Plains, 12 J. RURAL STUDIES 311 (1996).

¹⁴⁷ See Paul M. Jakus et al., Western Public Lands and the Fiscal Implications of a Transfer to States, 34 LAND ECON. 380 (2017) (finding a statistically significant relationship between the amount of private land ownership in a county and the quality of land that was available for disposal).

¹⁴⁸ *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 203 (1999).

states explicitly guaranteed that each state would be admitted on equal footing with the existing states.¹⁴⁹

The equal footing doctrine traces its roots to the Supreme Court's opinion in *Pollard v. Hagan*,¹⁵⁰ which involved competing claims of title to submerged lands. Georgia, as one of the original thirteen states, obtained title to the land at issue following the Revolutionary War¹⁵¹ and later ceded title to the land to the federal government. The federal government then granted the disputed land to Alabama upon statehood, reserving all navigable water as "public highways." The dispute turned on whether this provision reserved title to lands beneath navigable water in the federal government. Since the original states held title to submerged lands as an attribute of sovereignty stemming from their victory in the Revolutionary War, and new states were admitted on an equal footing with the original states, the Court held that Alabama was entitled to the submerged lands.¹⁵²

In the West, the federal government retains title to vast tracts of land. Ownership matters not just because of the control it implies, but because

¹⁴⁹ See Utah Enabling Act, 28 Stat. 107-12 § 4 (1894). See also, An Act To enable the people of New Mexico to form a constitution and state government and be admitted to the Union on an equal footing with the original States; and to enable the people of Arizona to form a constitution and state government and be admitted into the Union on an equal footing with the original States, 36 Stat. 557, 561 (1910) (hereinafter New Mexico and Arizona Enabling Act); An act to provide for the admission of the State of Wyoming into the Union, and for other purposes, 26 Stat. 222, 222 (1890) (hereinafter Wyoming Enabling Act); An act to provide for the admission of the State of Idaho into the Union, 26 Stat. 215 (1890) (hereinafter Idaho Enabling Act); Montana and Washington Enabling Act 25 Stat. 676, 679 (1889); An act to enable the people of Colorado to form a constitution and State government, and for the admission of said State into the Union on an equal footing with the original states, 18 Stat. 474 (1875) (hereinafter Colorado Enabling Act); An Act to enable the People of Nevada to form a Constitution and State Government, and for the Admission of such State into the Union on an Equal Footing with the original States, 13 Stat. 30, 30 (1864) (hereinafter Nevada Enabling Act); An Act for Admission of Oregon into the Union, 11 Stat. 383, 383 (1859) (hereinafter Oregon Enabling Act); An Act for the Admission of the State of California into the Union, 9 Stat. 452 (1850) (hereinafter California Enabling Act).

¹⁵⁰ 44 U.S. 212 (1845).

¹⁵¹ See Definite Treaty of Peace, U.S.-Britain, Sept. 3, 1783, found at 1 Malloy 587 (1910). See also, *Martin v. Waddell*, 41 U.S. 367, 410 (1842) ("when the revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the constitution to the general government.").

¹⁵² *Pollard*, 44 U.S. at 230.

federal lands are exempt from state and local taxes.¹⁵³ Thus, transfer proponents argue, continued federal ownership deprives states of control as well as the tax base needed to fuel economic growth.¹⁵⁴ States cannot condemn federal lands, which, they contend, deprives states of a critical tool needed for community growth and self-governance.¹⁵⁵ Together, transfer advocates argue, these ills make western states sub-equal sovereigns. Accordingly, say transfer advocates, the federal government must dispose of almost all the remaining public domain—as it did east of the Mississippi River—in order to assure that western states obtain a level of sovereignty on par with their Eastern peers.¹⁵⁶ The equal footing doctrine and theories of equal sovereignty, however, cannot be contorted to compel this conclusion.

First, while the equal footing doctrine applies to land beneath navigable waters, “the rule does not reach islands or fast lands located within such waters,”¹⁵⁷ much less millions of acres of desert landscape. Second, the equal footing doctrine pertains to political rights and sovereignty rather than economic status or condition.¹⁵⁸ As the Supreme Court explained:

The ‘equal footing’ clause has long been held to refer to political rights and to sovereignty. It does not, of course, include economic stature or standing. There has never been equality among the States in that sense. . . . Area, location, geology, and latitude have created great diversity in the economic aspects of the several States. The requirement of equal footing was designed not to wipe out those diversities but to create parity as respects political standing and sovereignty.¹⁵⁹

¹⁵³ As a condition on admission into the United States, Western states agreed that federal property was nontaxable. See e.g., Utah Enabling Act, 28 Stat. 107, 108 (1894). See also, *United States v. State Tax Comm’n*, 412 U.S. 363 (1973) (holding that federal lands cannot be subjected to local taxing authority).

¹⁵⁴ DAVALLIER LAW GROUP, LEGAL ANALYSIS OF THE LEGAL CONSULTING SERVICES TEAM PREPARED FOR THE UTAH COMMISSION FOR THE STEWARDSHIP OF PUBLIC LANDS, 8-9 (2015); but see *infra* Section III.D (discussing federal payments to states intended to compensate states for revenue foregone because of federal land ownership).

¹⁵⁵ DAVALLIER LAW GROUP, *supra* note 154, at 62–72.

¹⁵⁶ *Id.* at 55–99.

¹⁵⁷ *Texas v. Louisiana*, 410 U.S. 702, 713 (1973) (citing *Scott v. Lattig*, 227 U.S. 229, 244 (1913)).

¹⁵⁸ See *United States v. Texas*, 339 U.S. 707, 716 (1950).

¹⁵⁹ *Id.*

A factually analogous case out of Nevada is illustrative, as it addresses the equal footing doctrine as well as other popular pro-transfer arguments.

In the 1996 case, *United States v. Gardner*,¹⁶⁰ the Gardners held a permit to graze cattle on National Forest System lands. The USFS suspended the Gardners' grazing permit following a wildfire, providing time for vegetation to reestablish. The Gardners resumed grazing prematurely, ignoring an order to remove their cattle and pay fees for unauthorized grazing. The United States sued for damages to the range and to enjoin the Gardners from further grazing. The Gardners contended, among other things, that under the equal footing doctrine, "a new state must possess the same powers of sovereignty and jurisdiction as did the original thirteen states upon admission to the Union . . . [so] Nevada must have 'paramount title and eminent domain of all lands within its boundaries' to satisfy the Equal Footing Doctrine."¹⁶¹

The Ninth Circuit Court of Appeals found the Gardners' arguments unavailing, reiterating the Supreme Court's holding that the equal footing doctrine "applies to political rights and sovereignty, not the economic characteristics of the states."¹⁶² The doctrine is not intended to "eradicate all diversity among states but rather to establish equality among the states with regards to political standing and sovereignty."¹⁶³ The court therefore held that the equal footing doctrine cannot be used to force the federal government to extinguish title to federal public lands just because few such lands now exist outside of the western United States.

Congressional authority to prescribe management requirements applicable to federal lands arises from the United States Constitution, which predates every enabling act, and grants Congress the power to place limits on disposal of federal lands to all present and future states.¹⁶⁴ Indeed, the equal footing doctrine does not prevent Congress from placing limits on a state via a statehood enabling act, provided that Congress has authority to place those limits on states that already have been admitted.¹⁶⁵

¹⁶⁰ 107 F.3d 1314 (9th Cir. 1996).

¹⁶¹ *Id.* at 1318.

¹⁶² *Id.* at 1319.

¹⁶³ *Id.* (citing *United States v. Texas*, 339 U.S. 707, 716 (1950)).

¹⁶⁴ State enabling act legislation also uniformly required territories to adopt the U.S. Constitution. See, e.g., *Montana and Washington Enabling Act*, 25 Stat. 676 (1889); UTAH CONST. art. I, § 3 (declaring the "Constitution of the United States is the supreme law of the land.").

¹⁶⁵ *Branson School Dist. RE-82 v. Romer*, 161 F.3d 619 (10th Cir. 1998).

As residents of federal territories, westerners were on a decidedly unequal footing, as they were unable to elect their governor, judges, or other high officials.¹⁶⁶ They also lacked voting representations in Congress.¹⁶⁷ Admission to the Union guaranteed westerners equal treatment under the law, and that is precisely what they received. The promise contained in the equal footing doctrine has been fulfilled, and while there is no doubt that differences in condition exist, those differences cannot be spun into an entitlement to the public domain. As the Office of the Attorney General for the State of Idaho recognizes, equal footing doctrine-based claims to the public domain have “no support in the law,”¹⁶⁸ and, as the Conference of Western Attorneys General recently concluded:

Court precedents . . . provide little support for the proposition that the principles of equal footing or equal sovereignty may compel transfer of public lands to the western states. The Court has been given ample opportunity to apply such principles to public lands but, when given the opportunity to do so, it has repeatedly distinguished property issues as independent from the ‘limiting or qualifying of political rights and obligations’ that may trigger additional scrutiny under equal sovereignty principles.¹⁶⁹

B. Enclave Clause Claims

The “Enclave Clause” of the U.S. Constitution grants Congress the power to “exercise exclusive Legislation in all Cases whatsoever over [the District of Columbia] and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the same shall be, for the Erection of Forts, Magazines, Arsenals, Dock-Yards, and other needful Buildings.”¹⁷⁰ In 2012, the Utah Legislature enacted a joint resolution stating that because of the Enclave Clause, “the federal government is only constitutionally authorized to exercise jurisdiction over and above bare right and title over lands that are ‘purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful

¹⁶⁶ See *supra*, notes 89–100 and accompanying text.

¹⁶⁷ *Id.*

¹⁶⁸ Letter from Steven W. Strack, *supra* note 133.

¹⁶⁹ CONFERENCE OF WESTERN ATTORNEYS GENERAL, *supra* note 104, at 47.

¹⁷⁰ U.S. CONST. art. I, § 8, cl. 17.

Buildings.’¹⁷¹ That is simply not the case, and the Enclave Clause cannot be contorted to compel public land disposal.

Indeed, the federal government purchased almost 530 million acres (over twenty-three percent of the total land area of the United States) from France via the Louisiana Purchase, over 378 million acres via the Treaty with Russia for the Purchase of Alaska, as well as hundreds of millions of additional acres from Great Britain, Mexico, and Spain.¹⁷² This land was acquired pursuant to the federal government’s treaty-making power,¹⁷³ and is managed pursuant to the Property Clause of the U.S. Constitution.¹⁷⁴ As the Supreme Court long ago explained:

[S]ince the adoption of the constitution, [the federal government has], by cession from foreign countries, come into the ownership of a territory still larger, lying between the Mississippi river and the Pacific ocean, and out of these territories several states have been formed and admitted into the Union. The proprietorship of the United States in large tracts of land within these states has remained after their admission. There has been, therefore, no necessity for them to purchase or to condemn lands within those states, for forts, arsenals, and other public buildings, unless they had disposed of what they afterwards needed. Having the title, they have usually reserved certain portions of their lands from sale or other disposition, for the uses of the government.¹⁷⁵

The attorneys general of eleven of twelve western states concur, concluding that “the clear weight of relevant decisions by the United States Supreme Court is to the effect that ownership of the public lands by the federal government is not limited to those purposes set forth in the Enclave Clause.”¹⁷⁶ As the federal government is the rightful owner of the land, the Enclave Clause provides no basis for compelling disposal.

C. The Extinguish Provision and Disposal

Some contend that statehood enabling acts promise to “extinguish” title to the public domain—a promise breached by the federal government and remedied by either giving the land to the states or by other means of

¹⁷¹ See e.g., H.J. Res. 3, 2012 Gen. Sess. (Utah 2012).

¹⁷² PUBLIC LAND STATISTICS 2015, *supra* note 79, at 3.

¹⁷³ U.S. CONST. art. II, § 2, cl. 2.

¹⁷⁴ U.S. CONST. art. IV, § 3, cl. 2.

¹⁷⁵ *Ft. Leavenworth R.R. Co. v. Lowe*, 114 U.S. 525, 532 (1885).

¹⁷⁶ CONFERENCE OF WESTERN ATTORNEYS GENERAL, *supra* note 104, at 21.

disposal. Both history and the surrounding text cast doubt on their interpretation.

In return for statehood and land grants, Utah agreed to disclaim right and title to additional federal public lands. The statutory disclaimer of title to all other federal lands was included in section three of the Utah Enabling Act and incorporated into the Utah Constitution and states:

That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof; and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States.¹⁷⁷

Similar language is also found in the Arizona, Colorado, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, South Dakota, and Washington state enabling acts.¹⁷⁸

Those arguing for disposal claim “that until the title thereto shall have been extinguished by the United State, the same shall be and remain subject to the disposition of the United States” obligates the federal government to dispose of federal public lands.¹⁷⁹ They then argue that the state’s disclaimer of the right to additional land is inoperative because the federal government breached its obligation to dispose of those lands.¹⁸⁰ Nothing could be further from the truth.

Legislation must be interpreted in light of congressional intent,¹⁸¹ and historic context and events can help clarify congressional intent.¹⁸² When

¹⁷⁷ Utah Enabling Act, ch. 138, 28 Stat. 107, 108 (1894); see UTAH CONST. art. III (the language in the Utah Constitution is substantively equivalent).

¹⁷⁸ The Idaho and Wyoming enabling acts are slightly different, stating that they “shall not be entitled to any further or other grants of land for any purpose other than as expressly provided in this act.” Idaho Enabling Act, ch. 656, 26 Stat. 215, 217 (1890); Wyoming Enabling Act, ch. 664, 26 Stat. 222, 224 (1890).

¹⁷⁹ Kochan, *supra* note 97, at 1154–55 (emphasis added) (quoting the Utah Enabling Act).

¹⁸⁰ *Id.* at 1153–54.

¹⁸¹ *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982) (“Our task is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive.”) (internal citations omitted).

¹⁸² *Aulston v. United States*, 915 F.2d 584, 585 (10th Cir. 1990) (“To gain a proper understanding of the statute at issue, we must put it into its historical context.”).

enabling acts spoke of extinguishing title, Congress was referring not to disposal of the public domain, but to ongoing efforts to extinguish American Indian land claims. The House of Representatives confirmed its intent in its report on the Utah Enabling Act, where it said:

The convention shall also provide that the proposed State of Utah shall forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and all lands lying within the limits of the State owned or held by any Indian or Indian tribes, and until the Indian title shall have been extinguished by the United States, such Indian reservation shall be and remain subject to the disposition of the United States.¹⁸³

The Senate agreed with the House's assessment of the intention behind this clause,¹⁸⁴ a clause that apparently generated little controversy even if the language in the House Report and that in the enabling act differ slightly. In subsequently admitting Arizona and New Mexico to the Union, Congress adopted even clearer language, stating that "absolute jurisdiction and control" remain with Congress "until the title of such Indian or Indian Tribes shall have been extinguished."¹⁸⁵

The rush to end Indian land ownership occurred because an influx of returning Civil War veterans swelled demand for land. Efforts to remove Indians from lands desired by white settlers and to settle Indians upon reservations proved insufficient to keep up with the demand for land. Stated simply, "[t]here was no place left to remove the Indian, and there was little sympathy for the preservation of a way of life that left farmlands unturned, coal unmined, and timber uncut. Policymakers had determined that the old hunter way and new industrial way could not coexist."¹⁸⁶

Accordingly, Congress enacted the General Allotment Act of 1887 (the Dawes Act)¹⁸⁷ to address settlers' demand for valuable farmland. Under the Dawes Act, tribal members surrendered their undivided interest in the tribally owned reservation in return for title to a parcel of land that was allotted to them individually.¹⁸⁸ Upon approval of the allotments, the Secretary of the Interior issued patents, which were held in trust for the

¹⁸³ H.R. REP. NO. 53-162, at 17 (1893) (emphasis added).

¹⁸⁴ S. REP. NO. 53-414, at 19-20 (1894).

¹⁸⁵ New Mexico and Arizona Enabling Act, ch. 310, 36 Stat. 557, 569 (1910) (emphasis added).

¹⁸⁶ COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, supra note 126, § 1.04.

¹⁸⁷ Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (1887) [hereinafter the Dawes Act].

¹⁸⁸ Id. at 388.

benefit of Indian allottees until conclusion of the trust period, when title to the allotment transferred to individual Indians.¹⁸⁹ Additional lands were held in common by the tribe, and “surplus” land was subject to disposal,¹⁹⁰ meaning it was made available for white settlers.¹⁹¹

Allotment proved to be an effective tool with which to extinguish Indian land ownership. “In 1887, when the Dawes Act provided for allotting tribal lands to individual Indians, the American Indian’s heritage in land totaled 138 million acres. Less than fifty years later, when the allotment policy was abandoned, only 48 million acres were left in Indian hands.”¹⁹²

Notably, the Dawes Act became law in 1887. None of the pre-1887 statehood enabling acts refer to “extinguishing” title to lands. However, the enabling acts authorizing admission for eight of the next ten states, including Utah, all contain the extinguish provision.¹⁹³

Reading “extinguishment” as referring to Indian land title also comports with Utah’s history. In 1864 Congress directed the Secretary of the Interior to “cause the several Indian reservations . . . in the territory of Utah, excepting the Uinta [sic] Valley, to be surveyed into tracts or lots, not exceeding eighty acres each . . . and upon completion of said surveys shall cause said tracts or lots to be sold.”¹⁹⁴

In 1888, Congress modified the Uintah Valley Indian Reservation, declaring certain lands within the Reservation’s boundaries “to be the

¹⁸⁹ Id. at 389.

¹⁹⁰ Id. at 389–90.

¹⁹¹ COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, supra note 126, § 1.04; see also, Marc Slonim, Indian Country, Indian Reservations, and the Importance of History in Indian Law, 45 GONZ. L. REV. 517, 522 (2009).

¹⁹² COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, supra note 126, § 1.04.

¹⁹³ Montana and Washington State Enabling Act, ch. 180, 25 Stat. 676 (1889) (also includes North Dakota and South Dakota); Utah Enabling Act, ch. 138, 28 Stat. 107 (1894); An Act To enable the people of Oklahoma and of the Indian Territory to form a constitution and State government and be admitted into the Union on an equal footing with the original States; and to enable the people of New Mexico and of Arizona to form a constitution and State government and be admitted into the Union on an equal footing with the original States, ch. 3335, 34 Stat. 267 (1906) (hereinafter Oklahoma Enabling Act); New Mexico and Arizona Enabling Act, ch. 310, 36 Stat. 557 (1910). Idaho and Wyoming were both admitted to the Union in 1890, after petitioning Congress for statehood; the acts recognizing the petitions and granting admission are therefore slightly different for the enabling acts of their sister states. Compare Idaho Enabling Act, ch. 656, 26 Stat. 215 (1890), with Wyoming Enabling Act, ch. 664, 26 Stat. 222 (1890).

¹⁹⁴ Act of May 5, 1864, ch. 77, 13 Stat. 63 (1864).

public lands of the United States and restored to the public lands.”¹⁹⁵ “Restored” lands were to be “disposed of at public or private sale in the discretion of the Secretary of the Interior.”¹⁹⁶

In 1894, Congress authorized allotment of the Uncompahgre Indians’ reservation,¹⁹⁷ “restoring” lands that were “unsuitable” for allotment to the public domain.¹⁹⁸ After approval of the allotments, these public lands were opened to entry under homestead and mineral laws.¹⁹⁹

In 1897, Congress mandated the allotment and opening of the Uncompahgre Reservation.²⁰⁰ No allotments were made before the land was opened to settlement, though Congress confirmed eighty-three allotments by separate legislation.²⁰¹ One year later, the Uncompahgre Reservation was opened to homesteaders and the remaining lands became part of the public domain. That same year the federal government began making allotment to Indians upon the Uintah Indian Reservation and claiming all unallotted lands for the United States.²⁰²

Similar laws, joint resolutions, and presidential proclamations were enacted in 1902,²⁰³ 1903,²⁰⁴ 1904,²⁰⁵ and 1905,²⁰⁶ removing portions of

¹⁹⁵ Act of May 25, 1888, ch. 310, 25 Stat. 157, 157 (1888).

¹⁹⁶ *Id.* at sec. 2.

¹⁹⁷ Act of August 15, 1894, ch. 210, sec. 20, 28 Stat. 286, 337–38 (1894)

¹⁹⁸ *Id.*, sec. 20.

¹⁹⁹ *Id.*, sec. 21.

²⁰⁰ Act of June 7, 1897, ch. 3, 30 Stat. 62, 87 (1897).

²⁰¹ *Ute Indian Tribe v. State of Utah* 716 F.2d 1298, 1306–07 (10th Cir. 1983).

²⁰² Act of June 4, 1898, ch. 376, 30 Stat. 429 (1898).

²⁰³ Act of May 27, 1902, ch. 888, 32 Stat. 245, 263–64; Joint Res. No. 31 of June 19, 1902, 32 Stat. 744 (1902); see also 35 Cong. Rec. 6069 (1902) (authorizing the Secretary of the Interior, with consent of the Uintah and White River Bands, to allot the Uintah reservation prior to October 1, 1903, with “surplus” lands being restored to the public domain).

²⁰⁴ Act of March 3, 1903, ch. 994, 32 Stat. 982, 997–98 (reiterating the 1902 Act’s direction to allot the Uintah reservation, subject to the consent of the Uintah and White River Bands, with surplus lands being restored to the public domain. The Uintah and White River Bands did not consent to allotment).

²⁰⁵ Act of April 21, 1904, ch. 1402, 33 Stat. 189, 207–08 (extending the deadline for allotting the Uintah reservation, subject to the consent of the Uintah and White River Bands, as set forth in the 1902 and 1903 acts. The Uintah and White River Bands did not consent to allotment).

²⁰⁶ Act of March 3, 1905, ch. 1479, 33 Stat. 1048, 1069–70 (providing for inclusion of Uintah Valley Reservation timberlands in the Uintah Forest Reserve and authorizing allotment without the Uintah and White River bands’ consent, and opening certain unallotted lands); Presidential Proclamation of July 14, 1905, 34 Stat. 3116 (providing for inclusion of Uintah Valley Reservation timberlands in the Uintah Forest Reserve);

the Uintah Valley Indian Reservation for use as National Forests, reservoir sites, townsites, and opening Reservation lands for homesteading and mineral withdrawals. From the initial reservation, 1,010,000 acres were added to what is now the Uinta National Forest; 2,100 acres were designated as townsites; 60,260 acres were set aside for reclamation and reservoir purposes; 2,140 acres were entered as mining claims; and 1,004,285 acres were opened to homestead entry.²⁰⁷

Moreover, “[a] provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear.”²⁰⁸ Discussion of extinguishment also occurs in section six of the Utah Enabling Act, which grants Utah four sections of land in every township, but where a section is “embraced in permanent reservations for national purposes” that section:

shall not, at any time, be subject to the grants nor to the indemnity provisions of this Act, nor shall any lands embraced in Indian, military, or other reservations of any character be subject to the grants or to the indemnity provisions of this Act until the reservation shall have been extinguished and such lands be restored to and become a part of the public domain.²⁰⁹

Clearly, “extinguish” in section six refers to a potential future occurrence involving reserved lands; it does not establish any mandate to extinguish either the referenced “permanent” or “other” reservations. “[G]enerally, the same phrase within the same statute is to be given the same meaning,”²¹⁰ and there is no reason to depart from that rule here.

Presidential Proclamation of July 14, 1905, 34 Stat. 3119 (opening to entry all unallotted and unreserved lands; Presidential Proclamation of July 31, 1905, 34 Stat. 3139 (reserving and disposing of townsites); Presidential Proclamation of August 3, 1905, 34 Stat. 3141 (reserving reservoir sites); Presidential Proclamation of August 14, 1905, 34 Stat. 3143 (reserving and disposing of townsites).

²⁰⁷ ROBERT KEITER ET AL., LAND AND RESOURCE MANAGEMENT ISSUES RELEVANT TO DEPLOYING IN-SITU THERMAL TECHNOLOGIES, U.S. DEPARTMENT OF ENERGY TOPICAL REPORT 113 (2011).

²⁰⁸ *United Sav. Ass’n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988).

²⁰⁹ Utah Enabling Act, ch. 138, sec. 6, 28 Stat. 107, 112 (1894) (emphasis added).

²¹⁰ *Appert v. Morgan Stanley Dean Witter, Inc.*, 673 F.3d 609, 616 (7th Cir. 2009) (internal citations omitted); see also, *Merrill Lynch v. Dabit*, 547 U.S. 71, 86 (2009); *Firststar Bank, N.A. v. Faul*, 253 F.3d 982, 990 (7th Cir. 2001); cf. *Citron v. Citron*, 722 F.2d 14, 16 (1983) (it does not “seem logical that the same term . . . in the same statute . . . should have any different meaning.”).

In short, while Utah was pursuing statehood, the federal government was actively extinguishing Indian land ownership. Reservations were being reduced, and allotments were being created with the expectation that federal trust obligations would be terminated and that Indian land title would be extinguished. When the Utah Enabling Act mentions “extinguishing title” claims, this is precisely what Congress was referring to and what Utah’s residents understood.

D. Denial of the Benefit of the Bargain

Utah also argues that public land disposal was intended to provide a source of revenue to state and local government, and failure to dispose of federal lands deprives these governments the benefit of the statehood bargain.²¹¹ Because federal lands are not subject to state or local taxes,²¹² and more economic development would presumably occur on these lands if they were transferred to the states, continued federal ownership also hobbles much needed economic development. The argument, however, ignores the economic benefits derived from public lands and concerted federal efforts to offset revenue foregone.

Under the Payment in Lieu of Taxes (“PILT”) program, local governments receive payments in accordance with their population and the amount of federally owned land within their borders.²¹³ Similarly, the U.S. Forest Service pays twenty-five percent of its receipts to states in order to support roads and schools in the counties where national forests are located.²¹⁴ During fiscal year 2014, PILT and Forest Service payments combined totaled over \$727 million, more than \$557 million of which

²¹¹ UTAH CONST. DEF. COUNCIL, TOWARDS A BALANCED PUBLIC LANDS POLICY, A CASE STATEMENT FOR THE H.B. 148: UTAH’S TRANSFER OF PUBLIC LANDS ACT 3–4 (2012) (hereinafter CDC CASE STATEMENT).

²¹² E.g., *United States v. State Tax Comm’n of Mississippi*, 412 U.S. 363 (1973).

²¹³ 31 U.S.C. § 6902(a)(1) (2012).

²¹⁴ 16 U.S.C. § 500 (2012). See also, ROSS W. GORTE, KRISTINA ALEXANDER & M. LYNNE CORN, CONG. RES. SERV., FOREST SERVICE PAYMENTS TO COUNTIES — TITLE I OF THE FORESTS COUNTY REVENUES, SCHOOLS, AND JOBS ACT OF 2012: ISSUES FOR CONGRESS I (2012). Forest Service payments declined substantially during the 1990s, primarily due to reductions in timber sales. In the Secure Rural Schools and Community Self-Determination Act of 2000, Pub. L. 106-393, Congress addressed these declines by creating an optional alternative payment system for National Forest System land, providing more predictable funding.

went to the eleven contiguous western states.²¹⁵ The BLM and U.S. Fish and Wildlife Service also share a portion of non-mineral based receipts generated on public lands with state and local governments.²¹⁶

In addition, the Mineral Leasing Act guarantees states forty-eight percent of the revenue derived from leased mineral development occurring on federal lands.²¹⁷ Shared revenue offsets lost tax revenue and supports local communities,²¹⁸ “giving priority to those subdivisions of the State socially or economically impacted by development of minerals . . . for (i) planning, (ii) construction and maintenance of public facilities, and (iii) provision of public services.”²¹⁹ Total federal land payments to Utah and the eleven contiguous western states, including Mineral Leasing Act payments, are summarized in Table 2, *infra*, and totaled \$266 million and \$3.8 billion respectively in 2014.²²⁰ Payments to the eleven contiguous western states accounted for 91.9 percent of all federal land payments to states.²²¹

States also impose severance taxes on commodities extracted from the land, including land owned by the federal government,²²² as well as property taxes on equipment associated with commodity production or even the value of the commodities themselves.²²³ Severance taxes alone generated more than \$2.9 billion for the eleven contiguous western states during 2014.²²⁴ Reliable estimates of property tax revenue associated with commodity production are not readily available.

²¹⁵ Economic data produced using the Economic Profile System-Human Dimensions Toolkit, HEADWATERS ECON., A PROFILE OF FEDERAL LAND PAYMENTS <http://headwaters.economics.org/tools/eps-hdt>.

²¹⁶ See 43 U.S.C. § 315(j) (2012) (grazing) and 16 U.S.C. § 715s (2012) (wildlife refuges).

²¹⁷ 30 U.S.C. §§ 191(a), (b) (2012). This is an increase over the 37.5 percent allocated to states in the initial act. 41 Stat. 450 (1920) (amended by 30 U. S. C. §§ 191(a)–(b) (2012)); see also 30 U.S.C. § 191 (1970 ed.).

²¹⁸ 58 Cong. Rec. H. 7769-71 (daily ed. Oct. 30, 1919) (debating the Mineral Leasing Act).

²¹⁹ 30 U.S.C. § 191(a) (2012) (revenues due to the State of Alaska are subject to a different formula).

²²⁰ HEADWATERS ECON., *supra* note 215.

²²¹ *Id.*

²²² *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981) (upholding a thirty percent state severance tax on coal mined from federal land).

²²³ See e.g., UTAH CODE ANN. §§ 59-2-201(1)(a)(v), (vi) (2014) (tax valuation of mining properties).

²²⁴ CHERYL LEE ET AL., U.S. CENSUS BUREAU, STATE GOVERNMENT TAX COLLECTIONS SUMMARY REPORT: 2014 7 (2015).

It is difficult to square \$3.8 billion in federal land payments and billions more in tax revenue from development on federal land with claims that states have been denied the benefit of the bargain. Furthermore, public lands support a vibrant recreation economy that generates 7.6 million jobs and \$59.2 billion in state and local tax revenue annually.²²⁵ In Alaska and the eleven contiguous western states where most public lands are located, the recreation economy generates over 2.1 million jobs and \$17.3 billion in state and local government tax revenue.²²⁶ While public lands are not responsible for all of these benefits, they are a significant contributor to western economies.

²²⁵ The Outdoor Recreation Economy, OUTDOOR INDUSTRY ASSN. 1, 2 (2017), https://outdoorindustry.org/wp-content/uploads/2017/04/OIA_RecEconomy_FINAL_Single.pdf.

²²⁶ *Id.* at 11.

Table 2—Payments from Federal Lands and State Severance Taxes FY 2014*

State	Severance Taxes	PILT Payments	Forest Service Payments	BLM Payments	USFWS Refuge Payments	Federal Mineral Royalties	Total
Arizona	\$26,190,000	\$34,497,956	\$14,233,459	\$958,851	\$120,122	\$17,821	\$76,044,399
California	\$38,686,000	\$45,298,833	\$33,699,465	\$(21,570)	\$936,682	\$104,096,729	\$222,734,825
Colorado	\$245,087,000	\$34,530,642	\$12,785,953	\$846,240	\$570,361	\$171,674,589	\$465,739,872
Idaho	\$6,004,000	\$28,579,192	\$25,971,900	\$1,652,554	\$49,934	\$5,552,387	\$67,815,971
Montana	\$305,614,000	\$28,809,242	\$20,355,836	\$3,739,764	\$261,651	\$38,164,481	\$397,250,588
Nevada	\$111,395,000	\$25,439,484	\$3,980,106	\$2,623,024	\$70,815	\$7,206,707	\$150,826,531
New Mexico	\$1,066,343,000	\$37,677,905	\$10,224,819	\$3,150,333	\$107,448	\$579,084,340	\$1,697,654,188
Oregon	\$23,424,000	\$17,680,594	\$65,324,385	\$39,020,429	\$288,005	\$287,703	\$146,048,540
Utah	\$155,743,000	\$37,903,225	\$10,099,253	\$1,346,364	\$57,662	\$216,648,402	\$421,953,649
Washington	\$41,950,000	\$19,272,636	\$19,972,728	\$49,762	\$538,396	\$4,799	\$81,830,271
Wyoming	\$883,025,000	\$27,143,411	\$4,179,360	\$2,373,515	\$414,164	\$2,060,219,563	\$2,978,238,038
Total	\$2,903,461,000	\$336,833,120	\$220,827,264	\$55,739,266	\$3,415,240	\$3,182,957,521	\$6,706,136,872

* Lee et al., *supra* note 224, at 7 (severance tax data); HEADWATERS ECON., *supra* note 215 (federal land payments).

E. The Obligation to Dispose of the Public Domain

With its case in doubt, transfer movement demands have evolved into a more general contention that the federal government is obligated to dispose of the public domain. The argument appears to be that historical efforts to dispose of the public domain—through grants to miners, settlers, railroads, returning military veterans, states, and the like—created an implied promise of continued disposal that, when read in concert with enabling act language, creates a legally enforceable obligation. Both history and canons of statutory construction lay this theory bare.

Statehood enabling acts granted land to states for multiple purposes, and required states to disclaim all other claims to land. In Utah's case, the federal government gave the newly minted state land to support public schools, a university, an agricultural college, a school for miners, a normal school, a reform school, an "institution for the blind," an "insane asylum," a "deaf and dumb asylum," a miners' hospital, to support construction of the state capital, and to fund construction of irrigation reservoirs.²²⁷ By enumerating these purposes, Congress made clear its intent to grant land for these purposes and no others.²²⁸ If any ambiguity remained, Congress made it clear that the "State of Utah shall not be entitled to any further or other grants of land for any purpose than as expressly provided in this Act."²²⁹ To now interpret legislation as requiring disposal of almost the entire public domain would make Congress's carefully enumerated grants superfluous.²³⁰

Second, and as already noted, the federal government has long exercised the power to retain lands in federal ownership. Examples include national parks, national forest reserves, national monuments, military reservations, and a long list of other reservations. Any implied duty to dispose of the public domain must be read against this policy. The policy of retention both counsels against such broad implied intent, and it implies that discretion over disposal rests squarely with the federal government.

²²⁷ Utah Enabling Act, 28 Stat. 107, 109–10 (1894).

²²⁸ See *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 341 (2005) ("We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply.").

²²⁹ *Id.*

²³⁰ *In re Surface Mining Regulation Litigation*, 627 F.2d 1346, 1362 (D.C. Cir. 1980) ("It is, however, a fundamental principal of statutory construction that effect must be given, if possible, to every word, clause and sentence of a statute so that no part will be inoperative or superfluous, void or insignificant.") (internal citations omitted).

Any implied duty to dispose of the public domain must also be read against the maxim that “[c]ourts normally construe federal land grants narrowly, under a longstanding ‘rule that unless the language in a land grant is clear and explicit, the grant will be construed to favor the [granting] government so that nothing passes by implication.’”²³¹ Creating an implied promise that subsumes express grants, eliminates federal discretion, and flies in the face of longstanding federal practice is diametrically opposed to settled rules and practice.

Finally, even if a duty to “extinguish” title or dispose of the public domain is held to exist, there is no guarantee that lands would be conveyed to the states, or that states would not be required to pay for any lands they do receive. If additional public land disposal is required, states like Utah may either need to pay for any land that they receive, or the land may need to go to non-state entities. Indeed, if the public domain is to be disposed of, one can argue that land should be sold at market value to maximize revenue generation for the American people.²³² The breach alleged by transfer backers, in short, does not necessitate the remedy set forth in the TPLA.

F. “Shall” and the Promise to Sell the Public Domain

The Utah Enabling Act, like all other western enabling acts, states that “five percentum of the proceeds of the sale of public lands within the State, which shall be sold by the United States subsequent to admission of said State into the Union . . . shall be paid to the said state.”²³³ Transfer backers contend that “shall” is a term of obligation,²³⁴ relieving the federal government of discretion to retain the lands in question, and failure to dispose of enough of the public domain is a breach of the federal government’s duty to dispose.²³⁵

²³¹ *Lyon v. Gila River Indian Community*, 626 F.3d 1056, 1072 (9th Cir. 2010) (interpreting the Arizona Enabling Act) (internal citations omitted).

²³² See, e.g., H.R. 2657, 113th Cong. 2d Sess. § 1 (2013) (proposing market value public land sales, citing the potential revenue raised by the sales and the need to pay down the national debt as justification for disposal).

²³³ Utah Enabling Act, 28 Stat. 107, 110 (1894) (emphasis added).

²³⁴ Kochan, *supra* note 97, at 1157–58 (“This mandatory language removes from the federal government the choice to never dispose and instead retain such lands.”).

²³⁵ *Id.*

While it is true that “shall” is normally a term of obligation,²³⁶ two important exceptions exist. First, “shall” may be used to show “something that will take place or exist in the future.”²³⁷ For example, “we shall arrive tomorrow.” This definition of “shall” was included in legal dictionaries in use at the time of Utah’s admission to the Union and presumably understood by Congress.²³⁸ Second, at the time of the Utah Enabling Act’s passage, “shall” was understood as meaning “[m]ay, when used against a government; and must, when used under other circumstances.”²³⁹

Texts purportedly obligating the sovereign to convey away lands are “strictly construed against the grantee.”²⁴⁰ In this context, shall should be interpreted as it was understood at statehood, indicating that at some point in time the federal government may choose to sell portions of the public domain, and if it does so, five-percent of sale proceeds must go to the state. To do otherwise reverses settled rules of construction and ignores the plain meaning as understood at the time the statutes were enacted.

Even assuming that additional public land disposal is required, how much land must be disposed of remains a matter of congressional discretion. No statutory provisions mandating disposal of specific lands have been identified, beyond already satisfied in-place and quantity grants,²⁴¹ and “it lies in the discretion of the Congress, acting in the public interest, to determine how much of [its] property it shall dispose.”²⁴² Interpreting “shall” to create a vague obligation would open a Pandora’s Box of unintended consequences, creating new and nebulous obligations that threaten the very fabric of the American West.

Failure of legal theories aside, it would be a mistake to dismiss the transfer movement as sound and fury signifying nothing. The transfer movement taps into intense feelings, and the threat of litigation is an

²³⁶ See e.g., *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (“The mandatory ‘shall’ . . . normally creates an obligation impervious to judicial discretion.”).

²³⁷ AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE. See also shall, OXFORD DICTIONARY (7th ed. 2013) (defining shall as “expressing the future tense”); Shall, Merriam-Webster (2016) (“used to say that something is expected to happen in the future.”).

²³⁸ 1 FREDERICK STROUD, THE JUDICIAL DICTIONARY OF WORDS AND PHRASES JUDICIALLY INTERPRETED 722 (photo. reprint 2003) (1890).

²³⁹ 1 ARTHUR ENGLISH, A DICTIONARY OF WORDS AND PHRASES USED IN ANCIENT AND MODERN LAW 728 (1899).

²⁴⁰ *Shivley v. Bowlby*, 152 U.S. 1, 10 (1894); see also *U.S. v. Alaska*, 521 U.S. 1, 55 (1997).

²⁴¹ Grants to states are summarized in Table 1, *supra* Section II.D.

²⁴² *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 336 (1936).

effective way of keeping land management policy in the public eye. Antagonism toward a federal government increasingly painted as out of touch and inefficient, and the promise of local control over public lands have become powerful rallying cries for a disenfranchised electorate. With a new administration that is fixated on deregulation, one can imagine a strategic shift from litigation to federal legislation transferring either ownership or control over the public domain to the states. The fight, in short, appears poised to take on a stronger policy focus.

IV. POLICY CONSIDERATIONS AND UNINTENDED CONSEQUENCES

The promise of “better” or “more efficient” management is an oft-touted argument in favor of ceding public lands to the states. This section first discusses policy arguments for conveying the public domain to the states,²⁴³ and then turns to what state management may entail. While claims of “better” management do not create a legally cognizable right to wrest the public domain from the federal government, federal versus state management capacity is relevant to a broader discussion about land management and legislative responses to the ills perceived by transfer advocates.

A. The Empty Promise of More Efficient Management

Some argue that land should be turned over to the states because they would be more efficient managers. The Property and Environment Research Center (PERC) points out that state land managers earned an average of \$14.51 for every dollar spent on trust land management compared to \$3.11 for every dollar spent by the BLM.²⁴⁴ But state trust lands and federal multiple use lands are managed for different purposes. Trust lands are managed to maximize revenue generation,²⁴⁵ while multiple use lands provide a broader range of values, including non-

²⁴³ For an additional inventory of challenges inherent in devolving expansive public land to the states see, Michael C. Blumm, *The Case Against Transferring BLM Lands to the States*, 7 *FORDHAM ENVTL L. J.* 387 (1996).

²⁴⁴ HOLLY FRETWELL & SHAWN REGAN, *DIVIDED LANDS: STATE VS. FEDERAL MANAGEMENT IN THE WEST* 9 (2015), www.perc.org/sites/default/files/pdfs/150303_PERC_DividedLands.pdf.

²⁴⁵ See e.g. Utah Code Ann. § 53c-1-302(1)(b)(iii) (2014) (setting forth Utah’s trust land managers mandate to maximize revenue production).

revenue producing values such as wilderness, habitat, water quality, and scenery.²⁴⁶ These differing management objectives are a significant reason for the differences in the cost to manage and the revenue generated from School Trust lands versus federal public lands.²⁴⁷

Changing the manager without changing the management mandate is unlikely to produce more efficient or lower cost management. As the Cato Institute explains:

Examination of state land management policies indicates that state governments are no better managers than are federal bureaucrats. They are just as economically inefficient, ecologically short-sighted, and politically driven as their federal counterparts. . . . The fundamental problem is, not federal incompetence, but the political allocation of natural resources to favored constituencies, which subsidizes some at the expense of others and inflicts harm on both the ecological system and the economy as a whole. Transferring land to the states will only change the venue of those political manipulations.²⁴⁸

Like the Cato Institute, PERC recognizes that states' hopes of generating more revenue depend on changing the management mandate, not the manager.²⁴⁹

A direct transfer of lands to the states under similar rules and regulations as federal lands is unlikely to result in lower costs or higher revenues. On the other hand, if the transferred lands are managed like state trust lands, their fiscal performance may improve, but land management practices and existing rights could be affected in important ways.²⁵⁰

The team of economists hired by the state of Utah to evaluate Utah's takeover efforts also found that state land management agencies do not enjoy a cost advantage over federal agencies, and states will therefore likely incur management costs similar to those borne by their federal counterparts.²⁵¹ Similarly, a study commissioned by the state of Wyoming

²⁴⁶ See e.g., 43 U.S.C. §§ 1701(a)(7), 1702(c) (2012) (BLM's multiple-use mandate).

²⁴⁷ Y2 CONSULTANTS, STUDY ON MANAGEMENT OF PUBLIC LANDS IN WYOMING iii (2016).

²⁴⁸ Randal O'Toole, Should Congress Transfer Federal Lands to the States? CATO INSTITUTE POLICY ANALYSIS NO. 276 (1997).

²⁴⁹ FRETWELL & REGAN, *supra* note 244, at 29–30.

²⁵⁰ *Id.* at 10.

²⁵¹ Paul M. Jakus et al., Western Public Lands and the Fiscal Implications of a Transfer to States, 93 LAND ECONOMICS 372, 386 (2017).

concluded that transferring management obligations to the state without also transferring ownership, and therefore authority to redefine management objectives, would do little to address frustrations over public land management. The same federal statutory framework would apply and the “conflicts encountered would largely be the same for the state that exist under present management.”²⁵² In short, the mandate, not the manager, is the critical difference.

The question that remains is whether states could generate enough money from public lands to meet their management costs, and what changes in management policy would be needed to secure this result. These questions take on additional urgency because most western states have balanced budget requirements.²⁵³ Failure to generate sufficient revenue from the targeted lands would therefore force states to either raise taxes or cut funding for other government programs.

B. The Land Management Balance Sheet

Critically, much of the revenue the federal government collects from public lands is already directed back to the states where the development occurs.²⁵⁴ Financial viability therefore depends not on the total amount of revenue that can be generated from the targeted lands, but on the marginal increase in revenue that states can achieve.

Managing the targeted public lands within Utah is estimated to cost the state \$248.0 million annually.²⁵⁵ Over the last decade, Utah received an average of \$186.8 million annually in federal revenue sharing payments from development occurring within the state.²⁵⁶ Additionally, federal PILT payments are routed to counties with federal lands to offset tax revenue foregone because federal lands are not subject to state and local taxes.²⁵⁷ PILT payments would end if the federal government no longer

²⁵² STUDY ON MANAGEMENT OF PUBLIC LANDS IN WYOMING, *supra* note 247, at viii.

²⁵³ NATIONAL CONGRESS OF STATE LEGISLATORS, FISCAL BRIEF: STATE BALANCED BUDGET PROVISIONS 3 (2010), www.ncsl.org/documents/fiscal/statebalancedbudgetprovisions2010.pdf.

²⁵⁴ See 30 U.S.C. §§ 191(a), (b) (2012) (under the federal Mineral Leasing Act, forty-eight percent of this revenue is distributed to the state where the development occurs).

²⁵⁵ ECONOMIC ANALYSIS, *supra* note 7, at 150.

²⁵⁶ HEADWATERS ECON., Unpublished Data (on file with author). Mineral revenue sharing payments are highly volatile and in 2011 totaled \$289.2 million for Utah; four years later, mineral revenue sharing payments fell to \$116.2 million. *Id.*

²⁵⁷ 31 U.S.C. § 6902(a)(1) (2012).

controls the land.²⁵⁸ Over the last ten years, Utah's PILT payments averaged \$34.2 million annually.²⁵⁹ Utah must therefore generate approximately \$469.0 million annually from the targeted lands to maintain current revenue distributions and offset new management expenses: \$248.0 million for new management costs, plus \$186.8 million to maintain ongoing programs that are currently funded by federal revenue sharing, plus \$34.2 million to offset lost PILT payments.

Economists commissioned by the state of Utah found that total revenue from the public lands targeted by the state totaled \$331.7 million in 2013.²⁶⁰ With costs exceeding revenue by \$137.3 million annually, balancing the budget will pose a challenge.²⁶¹

With ninety-three percent of revenue from the targeted public lands tied to mineral development,²⁶² Utah's ability to break even relies directly on future mineral production volumes, prices, and revenue sharing. On June 30, 2017, West Texas Intermediate ("WTI") crude oil sold for \$46.02 per barrel, and natural gas sold for \$2.90 per thousand cubic feet.²⁶³ The U.S. Energy Information Administration ("EIA") expects global oil inventories to continue to build, keeping downward pressure on oil prices.²⁶⁴ Accordingly, the EIA expects WTI crude oil prices to average

²⁵⁸ Utah intends to offset lost PILT payments, by paying equivalent sums to the counties. UTAH CODE ANN. § 63J-4-606(2)(b)(vi)(E) (2014).

²⁵⁹ HEADWATERS ECON., Unpublished Data (on file with author). PILT payments are stable compared to shared mineral royalties. Between 2008 and 2015, Utah's PILT annual receipts ranged between \$35.6 and \$38.0 million. In contrast, annual federal mineral revenue sharing payments ranged from \$116.2 to \$289.2 million. *Id.*

²⁶⁰ ECONOMIC ANALYSIS, *supra* note 7, at 125.

²⁶¹ A 2016 assessment by the Utah Office of Legislative Research and General Counsel estimated management costs at \$125 to \$275 million annually. The Office concluded that marginal revenue would increase by \$102 to \$127 million annually. Based on mid-range estimates, management costs would exceed new revenue by \$85.5 million annually. UTAH OFF. OF LEGIS. RES. AND GEN. COUNS., FISCAL NOTE, H.B. 276, 2016 Gen. Sess. (Utah 2016), <http://le.utah.gov/~2016/bills/static/HB0276.html>.

²⁶² Headwaters Econ., Unpublished Data (on file with author). See also, ECONOMIC ANALYSIS, *supra* note 7, at xxvi. Other federal laws require revenue sharing for non-mineral revenue and account for the remaining seven percent of revenue. See e.g., 16 U.S.C. § 715s (2012) (wildlife refuges); 43 U.S.C. § 315 (2012) (grazing).

²⁶³ Cushing, OK WTI Spot Price FOB, U.S. ENERGY INFO. ADMIN., <https://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=PET&s=RWTC&f=D> (last visited Oct. 6, 2017); Henry Hub Natural Gas Spot Price, <https://www.eia.gov/dnav/ng/hist/rngwhhdd.htm> (last visited Oct. 6, 2017). Natural gas pricing was quoted per million BTUs, and converted to cubic feet based on 1,027 BTUs per cubic foot.

²⁶⁴ U.S. ENERGY INFORMATION ADMINISTRATION, SHORT-TERM ENERGY OUTLOOK 4 (July 2017), <https://www.eia.gov/outlooks/steo/archives/jul17.pdf>.

\$49 per barrel in 2017, rising to \$50 per barrel in 2018.²⁶⁵ Natural gas prices are projected to rise to \$3.10 per thousand cubic feet in 2017 and \$3.40 in 2018.²⁶⁶

Utah crude oil sells at a discount compared to WTI. This discount fluctuates over time, averaging \$5.36 per barrel between January 1986 and July 2014.²⁶⁷ With WTI projected to sell for around \$50 per barrel through 2018, it follows that Utah crude oil will sell for less than \$45 per barrel.

Low hydrocarbon prices mean low mineral royalty revenue. Recent economic modeling considered a scenario under which oil sells for an average of \$62 per barrel (Utah First Purchase Price), natural gas for \$3.30 per thousand cubic feet, and Utah increases the number of wells drilled by fifteen percent.²⁶⁸ Under this scenario, Utah could generate \$219 million during 2017 from the targeted lands.²⁶⁹ This assumes that Utah receives fifty percent of production royalties from existing wells, and all production royalties from wells drilled after transfer occurs.²⁷⁰ Revenues are projected to peak in 2022 at \$250 million and fall thereafter.²⁷¹ But, with Utah crude selling for seventy-three percent of the modeled price, Utah has almost no chance to generate the \$469 million needed to break even.

With Utah's ability to cover management costs linked to mineral development, one or more of five factors must change for Utah to break even: (1) Utah must increase mineral development much faster than predicted; (2) commodity prices must increase dramatically; (3) Utah must increase production royalty rates; (4) Utah must capture more than fifty percent of the revenue from existing production; or (5) Utah must dramatically increase coal production. None of these scenarios appear likely.

First, increasing development by significantly more than fifteen percent annually appears unlikely, as low prices will drive production down rather than up. Indeed, the number of operating drill rigs in Utah has

²⁶⁵ Id.

²⁶⁶ Id. at 9.

²⁶⁷ Oil & Gas Scenarios Frequently Asked Questions, Bureau of Econ. And Bus. Res., Univ. of Utah (2014) (on file with author). Five dollars per barrel is a conservative estimate because the discount between January 2004 and July 2014 averaged \$10.26/bbl, and averaged approximately \$15 per barrel during the first half of 2014. Id.

²⁶⁸ ECONOMIC ANALYSIS, *supra* note 7, at xxviii.

²⁶⁹ Id. This scenario is not a management recommendation, but rather, one possible outcome. We focus on this scenario because it represents what we believe to be the most likely scenario should the state succeed in its efforts.

²⁷⁰ Id. at xxviii.

²⁷¹ Id.

declined by roughly two-thirds between December 2014 and June of 2017.²⁷² Second, commodity prices are not projected to increase, let alone at the dramatic rate needed to make development profitable.²⁷³ Third, while Utah could conceivably increase the royalty rate on new mineral leases, royalty rates for existing leases are set by contract and cannot be changed unilaterally. Because it would take years for the state to begin generating significant revenue from new leases, increasing royalty rates would produce minimal short-term benefits. Fourth, the United States has historically retained mineral rights when conveying federal public lands to the states in their statehood enabling acts, and to do otherwise now would reverse longstanding precedent.²⁷⁴ Finally, Utah could increase coal production, possibly targeting deposits within the Grand Staircase-Escalante National Monument, but with Utah's coal royalties averaging less than \$29 million annually,²⁷⁵ production would need to increase many times over to fill the revenue gap. The ongoing transition from coal to natural gas for power production makes such an increase unlikely. Furthermore, it is hard to imagine the American public embracing coal production from within a National Monument.²⁷⁶

While the TPLA promises not to sell acquired lands and indicates that the state would receive only five percent of land sale proceeds,²⁷⁷ Utah may have little choice but to consider mortgaging or selling land. As the TPLA is not an agreement between the state and federal government, Utah could unilaterally amend the TPLA and attempt to retain a greater share of sale proceeds. Such an amendment and subsequent sales could create a sizeable new source of revenue, and a strong incentive to sell transferred lands, especially if Utah faces a significant revenue shortfall.

²⁷² BAKER HUGHES, North American Rig Count, <http://phx.corporate-ir.net/phoenix.zhtml?c=79687&p=irol-reportsother> (last visited Oct. 6, 2017).

²⁷³ See SHORT-TERM ENERGY OUTLOOK, *supra* note 264, at 5.

²⁷⁴ See *infra* Section IV.D.

²⁷⁵ ECONOMIC ANALYSIS, *supra* note 7, at xxvii.

²⁷⁶ It is also noteworthy that when the Grand Staircase-Escalante National Monument was created, the federal government acquired all of Utah's trust land located within the Monument's borders. In return for the state trust lands and other state inholdings within national forests, Indian reservations, and National Park Service managed lands, Utah received title to federal public lands elsewhere within the state, substantial coal resources, and \$50 million dollars in cash. Pub. L. No. 105-325, 112 Stat. 3139, at § 2(15) (1998). Demanding the return of lands that the state voluntarily conveyed away, and for which the state already received compensation, hardly seems fair—unless the state intends to return the compensation it already received.

²⁷⁷ UTAH CODE ANN. § 63L-6-103(2)(a) (2014).

These kinds of fiscal challenges are not unique to Utah. In timber-rich Idaho, the cost of managing transferred public lands would exceed revenue under all but the most optimistic scenario. According to a legislatively commissioned report:

The total net cost to the State of Idaho for the [Idaho Department of Land] transfer proposal would range from a loss of \$111 million/year under the low-end scenario to a loss of \$60 million/year under the medium scenario to a gain of \$24 million/year under the high-end scenario. Only under the high-end scenario . . . would the state realize a gain after covering costs of wildfire, recreation, highway maintenance and payments to counties.²⁷⁸

Furthermore, “it would take [Idaho] 10-15 years to ramp up to timber harvests on the transferred lands to their full potential.”²⁷⁹ Wyoming reached the same conclusion when considering management of the public domain: “Without significant changes to federal law, we would not anticipate any substantial gains in revenue production or additional sources of revenue with any transfer of management—certainly not enough to offset the enormous cost such an endeavor would likely entail.”²⁸⁰

Given the need to rapidly increase revenue production, states would likely increase fees charged to all public land users. Montana is finalizing its selection of lands promised to the state upon admission to the Union, a move that is anticipated to result in a “500 percent increase in grazing fees for any ranchers who lease BLM lands that get transferred to the state.”²⁸¹ This increase is in line with the disparity in grazing fees found in other states. In 2016, the BLM charged \$2.11 per animal unit month

²⁷⁸ Jay O’Laughlin, Issue Brief: Would a Transfer of Federal Lands to the State of Idaho Make or Lose Money? 5 (2014), https://posting.boiseweekly.com/media/pdf/pag-ib16_federal-land-transfer_1_.pdf.

²⁷⁹ *Id.* at 4.

²⁸⁰ STUDY ON MANAGEMENT OF PUBLIC LANDS IN WYOMING, *supra* note 247, at xxi.

²⁸¹ Brett French, State, BLM Negotiate Land Transfer to Settle 127-Year-Old Debt, BILLINGS GAZETTE (Oct. 20, 2016), http://billingsgazette.com/news/state-and-regional/montana/state-blm-negotiate-land-transfer-to-settle—year-old/article_b955b81d-516e-5ab4-a35f-efdb322f8f83.html; see also Laura Lundquist, The Other Land Transfer Effort, HIGH COUNTRY NEWS (Dec. 5, 2016), www.hcn.org/articles/states-receive-final-school-trust-lands-after-more-than-a-century?utm_source=WEBBER&utm_medium= mag (explaining in lieu selection and indicating that grazing fees may rise by a factor of ten).

(“AUM”)²⁸² to graze livestock on federal land.²⁸³ By comparison, Colorado’s grazing fees average \$11.88 per AUM during 2014.²⁸⁴ Public land grazers, therefore, should expect their grazing fees to increase if state takeover efforts succeed, as states would likely increase revenue to create consistency with their ongoing grazing programs.

Skiers, snowboarders, and recreational cabin owners may fare similarly. Across the eleven contiguous western states, there are 120 ski resorts operating on national forest lands, including iconic resorts like Vail and Sun Valley.²⁸⁵ The U.S. Forest Service also administers approximately 14,000 special use permits for recreational cabins and residences on forest lands.²⁸⁶ Presumably states that acquire public lands would honor existing ski area and recreation residence permit terms. The terms and conditions that states would impose upon new permits and permit renewal are uncertain, but may need to increase if states find themselves strapped for cash.

Royalties for oil and gas production would also likely increase. The USFS and BLM charge a 12.5 percent royalty on oil and natural gas production.²⁸⁷ Within the Intermountain West, states charge between 16.67 and twenty-five percent production royalties.²⁸⁸ States would likely

²⁸² An AUM is the amount of forage necessary to sustain one cow or its equivalent for one month. 43 C.F.R. § 4100.0-5 (2015).

²⁸³ BUREAU OF LAND MGMT., DEP’T. OF THE INTERIOR, INSTRUCTIONAL MEMO. NO. 2016-050, 2016 GRAZING FEE, SURCHARGE RATES, AND PENALTY FOR UNAUTHORIZED GRAZING USE (March 2, 2016), <https://www.blm.gov/policy/im-2016-50>. This represents a twenty-five percent increase over 2015 rates.

²⁸⁴ Letter from Matthew A. Pollart, Field Operations Section Supervisor, Colorado State Board of Land Commissioners to State Land Board Lessees re: Changes to Standard Grazing Rates Effective April 1, 2014 (March 24, 2014), <http://trustlands.state.co.us/NewsandMedia/Documents/AUM%20Equivalent%20Table%20and%202014%20Grazing%20Rate%20Increase%20Letter.pdf>.

²⁸⁵ Downhill Thrills: Skiing and Boarding in our National Forests, RECREATION.GOV www.recreation.gov/marketing.do?goto=acm/Explore_Go_Lists/downhillthrills.htm. (last visited Oct. 5, 2017); see also, 16 U.S.C. § 497b (2012) (National Forest Ski Area Permit Act).

²⁸⁶ FOREST SERV., U.S. DEP’T OF AGRIC., A GUIDE TO MAINTAINING THE HISTORIC CHARACTER OF YOUR FOREST SERVICE RECREATION RESIDENCE 1 (2014) www.fs.fed.us/eng/pubs/pdfpubs/pdf14232815/pdf14232815Pdpi100.pdf.

²⁸⁷ 43 C.F.R. § 3103.3-1(a)(1) (2015).

²⁸⁸ CTR. FOR WESTERN PRIORITIES, A FAIR SHARE: THE CASE FOR UPDATING FEDERAL ROYALTIES 3 (2013) <http://westernpriorities.org/wp-content/uploads/2013/07/A-Fair-Share.pdf>. See also CONG. BUDGET OFF., OPTIONS FOR INCREASING FEDERAL INCOME FROM OIL AND NATURAL GAS ON FEDERAL LANDS 20 (2016) www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/51421-oil_and_gas_options-2.pdf.

impose these higher rates on new production from transferred lands. Mineral lease renewals would also presumably prompt rate increases, bringing them into line with existing state leases and market conditions.

Hard rock mineral claimants face similar uncertainty. Federal mining laws allow entities to locate and stake a claim to certain minerals and to develop those minerals without paying a royalty.²⁸⁹ Claimants can retain rights to unpatented mineral claims indefinitely with only minimal financial outlays.²⁹⁰ These claims dot the West, including lands targeted by transfer proponents. It is unclear how these rights would be impacted if public land is transferred to the states. States would presumably seek to convert claims into leases to capture revenue and bring management in line with programs regulating mining on state trust lands, which impose production royalties.²⁹¹ How states would proceed and the implications for existing right holders are unclear.

C. Wildfire Cost and Policy

One cannot discuss the economics of public land management without addressing wildfires. Between 2002 and 2016 an average of more than 3.6 million acres burned annually across the eleven contiguous western states. That average, however, belies tremendous annual variability. In 2004 just 854,772 acres burned across that entire eleven state area, yet on twelve separate occasions over that same period, wildfires in a single state consumed more than a million acres. Both the total cost and cost per acre of fire suppression have increased steadily over the past twenty years.²⁹²

Within Utah, the USFS and the BLM spent an average of \$76.7 million annually from 2008 through 2012 on wildfire response.²⁹³ These costs would presumably fall to Utah if public lands are transferred to the

²⁸⁹ 30 U.S.C. § 29 (2012).

²⁹⁰ 30 U.S.C. § 28 (2012).

²⁹¹ See e.g., UTAH ADMIN. CODE r. 850-25-100 and -300 (2014) (requiring royalty payments on leased trust lands). As of 1996, all of the eleven contiguous Western States surveyed imposed royalties on hard rock mineral development occurring on state trust lands. Jon A. SOUDER & SALLY K. FAIRFAX, STATE TRUST LANDS: HISTORY, MANAGEMENT, & SUSTAINABLE USE 226 (1996).

²⁹² Figures compiled from Fire statistics, NAT'L INTERAGENCY FIRE CTR., www.nifc.gov/fireInfo/fireInfo_statistics.html (last visited Oct. 5, 2017).

²⁹³ Economic Analysis, *supra* note 7, at 506–07.

state.²⁹⁴ In a normal year, wildfire suppression may be a manageable burden. In a severe fire year or when the area at risk requires expensive suppression efforts (such as for fires near homes or critical infrastructure), costs could severely strain state resources. The risk of a catastrophic wildfire cannot be overstated. Across the eleven contiguous western states, there are over 1.9 million homes within the wildland-urban interface (“WUI”).²⁹⁵ Protection of private property within the WUI accounts for the lion’s share of firefighting expenses²⁹⁶ and would presumably become a state responsibility.

The promise of “active management” does change these realities. Utah is not using prescribed fire to reduce catastrophic fire risks on state lands, and there is no reason to believe that would change if it took over public lands. Between 2002 and 2016, prescribed fire accounted for only six percent of state lands consumed by fire; by comparison, prescribed fire accounted for over twenty-eight percent of the USFS lands burned within Utah.²⁹⁷

“Salvaging” timber that has succumbed to mountain pine beetle does not offer a solution for most states as costs far exceed the value of the timber removed. In Utah, for example, salvage sale costs average \$719 per acre, but produce just \$8 per acre in revenue.²⁹⁸ Arizona, Colorado, Nevada, New Mexico, and Wyoming all fare similarly, with sale costs exceeding proceeds.²⁹⁹

While transfer theory is grounded in a sincere belief that states would be better managers, the evidence simply does not support these claims. Asking the public to trust in states to do better in the absence of clear evidence of either plans or capacities is foolish.

²⁹⁴ In contrast, the Utah Department of Forestry, Fire & State Lands’ total budget was less than \$17 million in 2012. STATE OF UTAH, BUDGET SUMMARY, FISCAL YEAR 2012, FISCAL YEAR 2011 SUPPLEMENTALS 118 (2011).

²⁹⁵ HEADWATERS ECON., SUMMARY WILDFIRE STATISTICS (February 2013), <https://headwaterseconomics.org/dataviz/wui-development-and-wildfire-costs/>.

²⁹⁶ OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF AGRIC., REP. NO. 08601-44-SF, AUDIT REPORT, FOREST SERVICE LARGE FIRE SUPPRESSION COSTS 7 (2006).

²⁹⁷ Figures compiled from Fire statistics, *supra* note 292.

²⁹⁸ Jeffrey P. Prestemon et al., An Economic Assessment of Mountain Pine Beetle Timber Salvage in the West, 28 W. J. APPLIED FORESTRY 143, 148 (2013).

²⁹⁹ *Id.*

D. Federal Mineral Reservations

Even if states succeed in establishing a duty to dispose of public lands arising out of statehood enabling acts, that duty is unlikely to extend to mineral lands and the revenue they offer. And if states overcome this obstacle, the Sisyphean task of preparing tracks for conveyance may leave states with a victory that is hollow at best. Absent mineral lands, states will have a very hard time covering anticipated management expenses.

The 1889 act authorizing Montana, North Dakota, South Dakota, and Washington state to join the Union provides that “all mineral lands shall be exempt from the grants made by this act.”³⁰⁰ Similar provisions are contained in the Colorado,³⁰¹ Idaho,³⁰² Wyoming,³⁰³ New Mexico,³⁰⁴ and Arizona³⁰⁵ enabling acts, and these acts are states’ best hope of establishing a duty to dispose of the public domain. In contrast, enabling acts for California, Oregon, and Utah did not include an explicit federal mineral reservation, but the U.S. Supreme Court long ago dispelled any notion that Congress intended to convey mineral lands to these states.

*Ivanhoe Mining v. Keystone Consol. Mining Co.*³⁰⁶ involved a dispute over ownership of a mining claim, with Keystone claiming it received title to the land from the United States, while Ivanhoe claimed title from the state. California’s claim of title derived from its statehood enabling act, which granted it the right to title to certain enumerated lands. Despite the lack of an express mineral reservation in the enabling act, the Supreme Court held that “[m]ineral lands are, by the settled policy of the government, excluded from all grants; therefore the grant . . . of public lands to the state of California for school purposes, was not intended to cover mineral lands.”³⁰⁷ The Court reached the same conclusion in a case originating in Utah,³⁰⁸ and its holdings are consistent with administrative practice contemporaneous with Utah’s admission to the Union.³⁰⁹

³⁰⁰ Enabling Act of 1889, ch. 180, 25 Stat. 676, 681 (1889).

³⁰¹ Colorado Enabling Act, ch. 139, 18 Stat. 474, 476 (1875), amended by ch. 20, 23 Stat. 10 (1884).

³⁰² Idaho Enabling Act, ch. 656, 26 Stat. 215, 217 (1890).

³⁰³ Wyoming Enabling Act, ch. 664, 26 Stat. 222, 224 (1890).

³⁰⁴ New Mexico and Arizona Enabling Act, ch. 310, 36 Stat. 557, 561 (1910).

³⁰⁵ *Id.* at 572.

³⁰⁶ 102 U.S. 167 (1880).

³⁰⁷ *Id.* at 174–75.

³⁰⁸ *U.S. v. Sweet*, 245 U.S. 563, 572 (1918).

³⁰⁹ In 1898, the General Land Office (GLO, the precursor agency to the BLM) recognized an implied reservation of minerals in section eight of the Utah Enabling Act

It is also noteworthy that the express reservation contained in the Montana, North Dakota, South Dakota, Washington state, Colorado, Idaho, Wyoming, New Mexico, and Arizona enabling acts all apply to “all mineral lands” without regard to the means of conveyance. To grant Utah lands that were expressly excluded from grants to her sister states would give Utah a unique advantage that is at odds with Utah’s insistence that it must be placed on an equal footing with other states.

These barriers aside, it is worth considering what happens if a court reverses more than a century of settled law. Reservations of mineral lands, “are not held to exclude all lands in which minerals may be found, but only those where the mineral is in sufficient quantity to add to their richness, and to justify expenditure for its extraction.”³¹⁰ A leading treatise on mining law in effect at the time of the Utah’s admission to the Union summarizes the rules for determining the mineral character of land:

The mineral character of the land is established when it is shown to have upon or within it such a substance as—(a) Is recognized as mineral, according to its chemical composition, by the standard authorities on the subject; or (b) Is classified as a mineral product in trade or commerce; or (c) Such a substance (other than the mere surface which may be used for agricultural purposes) as possesses economic value for use in trade, manufacture, the sciences, or in the mechanical or ornamental arts.³¹¹

In sum, the existence and extent of the federal reservation depends on both the nature and quantum of the mineral resource, and whether the value of those resources outweighs the value of the land for agricultural purposes.³¹² These are highly fact-intensive and site-specific questions that the California Supreme Court summarized nicely 151 years ago when it said:

precluding grants of mineral lands for universities. *Richter v. Utah*, 27 Pub. Lands Dec. 95 (1898). One year later the GLO recognized an implied reservation of minerals in section seven of the act, precluding grants of coal and mineral lands as part of the grant supporting construction of the state capitol. *State of Utah*, 29 Pub. Lands Dec. 69 (1899). Four years later, the GLO observed that “[i]t is settled law that a grant of school lands to a State [under section six of the act] does not carry lands known to be chiefly valuable for mineral at the time when the State’s right would attach, if at all.” *State of Utah*, 32 Pub. Lands Dec. 117 (1903); see also, *Mahogany No. 2 Lode Claim*, 33 Pub. Land Dec. 37 (1904).

³¹⁰ *Davis v. Wiebbold*, 139 U.S. 507, 519 (1891); *Deffeback v. Hawke*, 115 U.S. 392, 404 (1885).

³¹¹ LINDLEY, *supra* note 125, at 116.

³¹² *Diamond Coal & Coke Co. v. U.S.*, 233 U.S. 236, 239–40 (1914).

It is not easy in all cases to determine whether any given piece of land should be classed as mineral lands or otherwise. The question may depend upon many circumstances such as whether it is located in those regions generally recognized as mineral lands, or in a locality ordinarily regarded as agricultural in its character. Lands may contain the precious metals, but not in sufficient quantities to justify working them as mines, or make the locality generally valuable for mining purposes, while they are well adapted to agricultural or grazing pursuits; or they may be but poorly adapted to agricultural purposes, but rich in minerals; and there may be every gradation between the two extremes. There is, however, no certain, well defined, obvious boundary between the mineral lands and those that cannot be classed in that category. Perhaps the true criterion would be to consider whether upon the whole the lands appear to be better adapted to mining or other purposes. However that may be, in order to determine the question, it would, at all events, be necessary to know the condition and circumstances of the land itself, and of the immediate locality in which it is situated.³¹³

As useful as they may at first appear, geological survey maps have not traditionally been considered in determining the mineral or non-mineral character of the public domain.³¹⁴ A more critical eye is required because surveyors were generally not qualified as geologists, nor were they charged with reviewing the lands within the interior of surveyed areas. Therefore today:

In making mineral character determinations the Department of the Interior acts as a special tribunal with judicial functions. Once the Secretary issues a patent, certifies a list, or makes a survey . . . the findings of fact that precede the issuance of the patent or other instrument are conclusive upon the Department and the courts. Although questions of law are reviewable by the courts, they are not subject to reexamination by the Department.³¹⁵

As the mineral or non-mineral character of the lands at issue must be determined before a court can determine whether a parcel of land would

³¹³ *Ah Yew v. Choate*, 24 Cal. 562, 567 (1864).

³¹⁴ LINDLEY, *supra* note 125, at 118. While the federal surveyor general was required to note mineral features encountered during public land surveys, these notations serve as *prima facie* evidence of mineral or non-mineral character but are not dispositive. *Id.* at 118–20.

³¹⁵ ROCKY MTN. MINERAL L. FOUND., *AMERICAN LAW OF MINING* § [12.02[1]] (LexisNexis Matthew Bender, 2nd ed. 2015).

be subject to transfer, the Department of the Interior would need to complete an unprecedented number of adjudicatory decisions, as well as the factual investigations each adjudication requires. Knowledge of coal, oil, and natural gas formations has been largely established and may ease this burden somewhat, but knowledge of other minerals may be less well defined.³¹⁶ Regardless of the type of minerals involved, adjudicating the character of millions of acres of land would likely cause decades of delay before any transfers could occur.³¹⁷

Even after all of these factual matters are resolved, states may be unable to secure the lands they covet. Land cannot be conveyed out of federal ownership until it is surveyed, and that has proven to be a Sisyphean task. The public land survey system divides the landscape into townships, each of which contains thirty-six sections, each of which is normally one square-mile in size (640 acres).³¹⁸ The Arizona, New Mexico, and Utah enabling acts grant the states four sections in every township within the state.³¹⁹ Enabling acts for other western states contain similar provisions but generally grant states two sections in each township.³²⁰ Where these “in place” grants were subject to prior sales, grants, or reservations, states have the right to select “in-lieu” lands. States also received “quantity grants,” which included a specified number of acres that the state could select from the surveyed public domain.³²¹

³¹⁶ With respect to coal and oil bearing lands, mineral classification may be based on facts creating a reasonable belief that the lands contain minerals, which can be established by inference from nearby geologic features. See *Diamond Coal & Coke Co. v. U.S.*, 233 U.S. 236, 249 (1914) (inferring knowledge of coal from proximate geology and development activity); see also, *AMERICAN LAW OF MINING*, supra note 315, § [12.02[4]].

³¹⁷ Faced with a near impossible task of investigating every section of land subject to grant or state selection, as well as a growing number of cases challenging the validity of prior grants, Congress passed the Jones Act, ch. 57, 44 Stat. 1026 (1927) (codified as amended at 43 U.S.C. §§ 870-71 (2012)), releasing to the states grants of numbered school sections that had been previously withheld because of mineral classification. The Act, however, applies only to in-place numbered section grants supporting public schools. The TPLA does not contend that the federal government failed to dispose of enumerated in-place school sections. Rather, the TPLA contends that the federal government failed to dispose of sections other than those specifically identified in statehood enabling acts. The Jones Act, therefore, does not apply to TPLA claims.

³¹⁸ See 43 U.S.C. § 751 (2012).

³¹⁹ Arizona and New Mexico Enabling Act, ch. 310, 36 Stat. 557, 561 (1910); Utah Enabling Act, ch. 138, 28 Stat. 107, 109 (1894).

³²⁰ See *GATES*, supra note 73, at app. C (summarizing the grants made to each state upon admission to the Union).

³²¹ See e.g., Utah Enabling Act, ch. 138, 28 Stat. 107, 109–10 (1894).

Conveyance of these lands to the states required completion of public land surveys because the boundary of lands to be conveyed could not be marked on the ground or defined with adequate legal precision until surveys were finalized.³²² Where surveys were completed prior to states joining the Union, the effective date of the grant coincides with statehood.³²³ Where statehood preceded surveys as in much of the West, lands remain in federal ownership until surveys are completed.³²⁴

Despite ongoing efforts to survey the West,³²⁵ millions of acres of the public domain have never been surveyed. In Nevada, for example, approximately thirty percent of the state remains to be surveyed.³²⁶ Maps depicting the condition of surveys in Utah were completed during 2008-2009, and indicate that roughly one-third of the state has not been surveyed.³²⁷ Many existing surveys are also quite old and may need to be updated before a conveyance could occur.

³²² GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, 2 PUB. NAT. RESOURCES L. § 13:51 (Thompson Reuters, 2nd ed. 2017) (“Precise boundaries are necessary for secure land titles.”).

³²³ *United States v. Wyoming*, 331 U.S. 440, 443–44 (1947).

³²⁴ *Id.*; see also *Andrus v. Utah*, 446 U.S. 500, 506–07 (1980) (internal citations omitted) (“Whether the Enabling Act contained words of present or future grant, title to the numbered sections did not vest in the State until completion of an official survey. Prior to survey, the Federal Government remained free to dispose of the designated lands in any manner and for any purpose consistent with applicable federal statutes.”); *Heydenfeldt v. Daney Gold & Silver Mining Co.*, 93 U.S. 634 (1876) (interpreting Nevada Enabling Act).

³²⁵ During FY 2015, the Department of the Interior completed original surveys of 2,157,820 acres and resurveyed 485,796 acres. Almost all the newly surveyed acres were in Alaska. PUBLIC LAND STATISTICS 2015, *supra* note 79, at 24.

³²⁶ “In Nevada, the GLO/Cadastral surveys were initiated in 1861. Current survey conditions in Nevada have approximately 40% of Nevada townships surveyed prior to 1910 and monumented with stone or wooden posts at the corner points. Another 30% are [sic] surveyed after 1910 utilizing metal post and brass cap monuments at the corner points. The remaining 30% is unsurveyed land.” Cadastral Survey, U.S. DEP’T OF LAND MGMT., https://web.archive.org/web/20160312132253/http://www.blm.gov/nv/st/en/prog/more_p rograms/geographic_sciences/cadastral.html (last visited Nov. 13, 2017).

³²⁷ Estimates are based on fifteen Geographic Coordinate Database Section Status (GCDB) maps prepared by the Bureau of Land Mgmt., U.S. Dep’t of the Interior (on file with author).

V. UNDERSTANDING THE ROOTS OF FRUSTRATION AND EXPLORING ALTERNATIVES TO LAND TRANSFERS

The number of transfer bills taken up by state legislatures and the proliferation of self-help remedies to perceived mismanagement of the public domain attest to the depth of frustration some feel. If we are to find a tenable path out of the cycle of sagebrush rebelliousness we must understand and address the roots of frustration. At their most basic, the frustrations come down to the challenge of striking an acceptable balance in managing our public lands. As one prominent scholar explains, “[b]iological sciences cannot tell us how much Wilderness is enough, and economists cannot calculate whether the money spent to save bald eagles was worth it.”³²⁸ Accordingly, “decisions regarding multiple use policy are policy decisions and they will continue to be driven by politics no matter who manages those lands.”³²⁹ This section reviews several of the factors involved in striking that balance, and then turns to possible means of addressing those problems.

A. Policy and Demographic Evolution — And the Challenges They Wrought

Between 1976 and 2016, the population of the eleven contiguous western states grew at more than twice the pace of the rest of the country, swelling from 37.3 million to 74.5 million.³³⁰ The three fastest growing states over that period were Nevada, Arizona, and Utah, and their growth dramatically impacted the landscape. Between 2001 and 2011, more than two million acres of natural areas in the West were lost to human development, with Wyoming and Utah experiencing the largest percentage change in area modified by human development.³³¹ Laws, management policies, and societal priorities necessarily evolved to reflect

³²⁸ George Cameron Coggins, ‘Devolution’ in Federal Land Law: Abdication by any Other Name. . . , 14 HASTINGS W.-NW. J. ENVTL. L & POL’Y 485, 489 (2008).

³²⁹ STUDY OF MANAGEMENT OF PUBLIC LANDS IN WYOMING, *supra* note 247, at v.

³³⁰ Population data compiled from Bureau of the Census, Dept. of Commerce, Statistical Abstract of the United States 1977, Table 10: Population States: 1960 To 1976 (1977); and Bureau of the Census, Dept. of Commerce, Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2010 To July 1, 2016 (Nst-Est2016-01).

³³¹ CTR. FOR AMERICAN PROGRESS, The Disappearing West, <https://disappearingwest.org> (last visited May 17, 2016).

both changing demographic realities and social priorities. Communities sometimes struggle to adapt to these changes, and understanding evolutionary change can help us understand the discontent we face today.

Prior to 1934 and enactment of the Taylor Grazing Act,³³² the federal government made little effort to manage livestock grazing on the public domain. The Taylor Grazing Act marked a profound change in public land management philosophy, creating grazing districts which included portions of the public domain deemed “chiefly valuable for grazing and raising forage crops.”³³³ Proposed grazing districts were withdrawn from all forms of entry of settlement.³³⁴

The Wilderness Act,³³⁵ enacted in 1964, set aside large tracts of public land as free from development. Today, Wilderness areas overlay more than 109 million acres mostly in the West.³³⁶ While many see the Wilderness Act as protecting irreplaceable natural landscapes, some in timber- or mineral-dependent communities see access to prosperity-sustaining commodities foregone.

The Endangered Species Act,³³⁷ signed into law three years later, requires all federal agencies to conserve endangered species and threatened species,³³⁸ prohibiting actions that harm a listed species or its habitat.³³⁹ Efforts to protect endangered species have placed lands containing valuable commodities out of reach to developers, often to the consternation of those who see jobs lost and tax revenue foregone.

Two years later, the Federal Land Policy and Management Act (“FLPMA”)³⁴⁰ repealed a host of statutes allowing for the disposal of federal public lands,³⁴¹ replacing those statutes with a commitment to retaining most public lands in federal ownership.³⁴² FLPMA also

³³² Taylor Grazing Act, ch. 865, 48 Stat. 1269 (1934) (codified as amended at 43 U.S.C. §§ 315a–n, 315o–1, 485, 1171).

³³³ 43 U.S.C. § 315 (2012).

³³⁴ *Id.*

³³⁵ 16 U.S.C. § 1131-36 (2012).

³³⁶ The Beginnings of the National Wilderness Preservation System, WILDERNESS CONNECT, <http://www.wilderness.net/NWPS/fastfacts> (last visited October 9, 2017).

³³⁷ 16 U.S.C. §§ 1531-44 (2012).

³³⁸ 16 U.S.C. § 1531(c)(1).

³³⁹ 16 U.S.C. § 1532(19) (2012); 50 C.F.R. § 222.102 (2015).

³⁴⁰ 43 U.S.C. §§ 1701–84.

³⁴¹ 43 U.S.C. § 161-254 (1970) (repealed 1976).

³⁴² 43 U.S.C. § 1701(a).

recognized numerous non-commodity values, pivoting the BLM toward multiple-use, sustained-yield management.³⁴³

The National Forest Management Act³⁴⁴ and the Multiple-Use, Sustained-Yield Act³⁴⁵ broadened the Forest Service's mandate, requiring management for "outdoor recreation, range, timber, watershed, and wildlife and fish,"³⁴⁶ and "judicious use of the land . . . and harmonious and coordinated management of the various resources."³⁴⁷

Balancing competing public lands uses often trigger the National Environmental Policy Act ("NEPA"), and can require evaluation in an environmental impact statement.³⁴⁸ While NEPA provides valuable opportunities for public involvement,³⁴⁹ it also increases the time and expense involved in obtaining agency approvals, and decisions may need to be revisited considering new information and changed conditions,³⁵⁰ injecting an additional level of uncertainty into development planning. Striking the balance required under these and other laws while accounting for profound demographic and societal change is a daunting task, especially as policy priorities evolve. Consequently, disagreements over the balance being struck between consumptive and conservation uses can engender frustration with public land managers.

B. Evolutionary Pain and Western Discontent

Not all communities have anticipated or adapted to evolving conditions or management requirements. Some see management changes as an attack on the western way of life and the communities that developed in reliance on public lands.³⁵¹ The pain many feel is real, as is their interest

³⁴³ 43 U.S.C. § 1701(a)(8).

³⁴⁴ 16 U.S.C. §§ 1600–14 (2012).

³⁴⁵ 16 U.S.C. § 528-31 (2012).

³⁴⁶ *Id.*

³⁴⁷ 16 U.S.C. § 531(a) (2012).

³⁴⁸ 42 U.S.C. § 4332(2)(C) (2012) (a less intensive environmental assessment may be required if it is unclear whether the impacts are significant); 43 C.F.R. § 1501.3 (2015).

³⁴⁹ See 40 C.F.R. §§ 1501.7, 1502.19, 1503.1–1503.4, 1506.6 (2015).

³⁵⁰ See, e.g., 40 C.F.R. § 1502.9(c) (2015) (requiring supplemental NEPA analysis where agency actions change or new information becomes available).

³⁵¹ See, e.g., BRIAN ALLEN DRAKE, *LOVING NATURE, FEARING THE STATE: ENVIRONMENTALISM AND ANTIGOVERNMENT POLITICS BEFORE REAGAN* (2013) (discussing early federal-state tensions over public land management); R. MCGREGOR CAWLEY, *FEDERAL LAND WESTERN ANGER: THE SAGEBRUSH REBELLION & ENVIRONMENTAL POLITICS* (1993) (discussing the "Sagebrush Rebellion"); JAMES R. SKILLEN, *THE NATION'S*

in engaging in the management of lands that are close to their livelihoods.³⁵² This section introduces several examples of the frustrations that underlie transfer efforts, and that must be overcome by any successful effort to address the true causes of frustration.

1. Fragmented Landscape; Divergent Objectives

“[Today, t]he land ownership map of the West in many places resembles a crazy quilt, without reason or coherent pattern . . . [and] fragmented ownership patterns generate a plethora of disputes over access and similar problems.”³⁵³ Upon admission to the Union, states received the right to title to specified sections of land. These grants extended across a state in scattered one square-mile parcels, providing nascent state governments with a representative sample of marketable natural resources and creating an incentive to develop all parts of the state.³⁵⁴

Lands were granted to states to generate revenue in support of public schools and institutions and are managed by the states as part of a trust to support those beneficiaries.³⁵⁵ Administrators of state trust lands currently manage 40.4 million acres of surface estate across the eleven contiguous western states.³⁵⁶ In Utah, for example, the School and Institutional Trust Lands Administration (“SITLA”) manages 3.3 million acres—a land area larger than Connecticut³⁵⁷ but scattered across the landscape in over 9,000 individual parcels. The challenges inherent in managing a fragmented

LARGEST LANDLORD: THE BUREAU OF LAND MANAGEMENT IN THE AMERICAN WEST (2009) (discussing “neospacebrush politics”).

³⁵² See Charles F. Wilkinson, *Cross-Jurisdictional Conflicts: An Analysis of Legitimate State Interests on Federal and Indian Lands*, 2 U.C.L.A. J. ENVTL. L. & POL’Y 145 (1982) (addressing the legitimacy of state interests and the disconnect between those interests and state actions).

³⁵³ GEORGE CAMERON COGGINS & ROBERT L. GLICKMAN, 1 PUBLIC NATURAL RESOURCES LAW, § 2:9 (2d ed. 2010, Feb 2016 update).

³⁵⁴ Additionally, states received the right to select hundreds of thousands of additional acres from across the unreserved lands within the state. These grants are often referred to as “quantity grants,” because the quantity of land granted to the states was set forth by statute.

³⁵⁵ SOUDER & FAIRFAX, *supra* note 291.

³⁵⁶ HEADWATERS ECON., *supra* note 215.

³⁵⁷ The land area of Connecticut is 4,840 square-miles or 3,097,600 acres. U.S. CENSUS BUREAU, DEP’T OF COMM., 2012 STATISTICAL ABSTRACT OF THE UNITED STATES, tbl.358., <https://www2.census.gov/library/publications/2011/compendia/statab/131ed/2012-statab.pdf>.

landscape come into focus when we consider competing management objectives.³⁵⁸

SITLA, like other states' trust lands administrators, must manage lands in the most "prudent and profitable manner possible" to support public schools and institutions.³⁵⁹ Specifically, SITLA must "obtain the optimum values from use of trust lands and revenues for the trust beneficiaries, including the return of not less than fair market value for the use, sale, or exchange" of trust assets.³⁶⁰ "[T]rust beneficiaries do not include the general public or other governmental institutions, and the trust is not to be administered for the general welfare of the state."³⁶¹ Most state trust lands remain in individual 640 acre parcels that are surrounded by federal lands.

The BLM is directed to "prevent unnecessary or undue degradation of the lands,"³⁶² and the USFS must insure that timber harvests do not unnecessarily impair other sensitive resources.³⁶³ Both agencies manage large tracts of congressionally designated wilderness, and the BLM manages Wilderness Study Areas ("WSAs") to prevent impairment to wilderness values until Congress acts on pending wilderness proposals.³⁶⁴ Across the West, congressionally designated wilderness and WSAs cover over 48 million acres. Other parts of the federal landscape, such as National Parks and Wildlife Refuges are also managed for conservation objectives.³⁶⁵ The intertwining of lands that are managed by different entities and for differing purposes invites conflict.³⁶⁶

State trust land inholdings are also found in BLM managed National Monuments and National Conservation Areas in Alaska, Arizona,

³⁵⁸ Fairfax argues persuasively that public land fragmentation is more of a challenge for the BLM than for other federal land managers, and the need to cooperate with other land owners makes the BLM weaker than other agencies that are both better funded and able to act with greater independence. Sally Fairfax, *Old Recipes for New Federalism*, 12 *ENVTL. L.* 945, 975 (1982).

³⁵⁹ UTAH CODE ANN. § 53C-1-102(2)(b) (2014); see also SOUDER & FAIRFAX, *supra* note 291, chs. 1&2 (discussing mandate as applied across the West).

³⁶⁰ UTAH CODE ANN. § 53C-1-302(1)(b)(iii).

³⁶¹ UTAH CODE ANN. § 53C-1-102(2)(d); *Nat'l Parks Conservation Ass'n v. Bd. of State Lands*, 869 P.2d 909, 919 (Utah 1994).

³⁶² 43 U.S.C. § 1732(b).

³⁶³ 16 U.S.C. § 1604(g)(3)(E) (2012).

³⁶⁴ 43 U.S.C. § 1782(c) (2014).

³⁶⁵ 16 U.S.C. §§ 1 to 18f-3 (2012) (National Parks); 16 U.S.C. § 460K (2012) (National Wildlife Refuges).

³⁶⁶ See Bruce Babbitt, *supra* note 4, at 853–54 (noting the challenges of lack of management control and competing management objectives).

California, Idaho, Montana, and New Mexico,³⁶⁷ as well as in BLM managed National Conservation Areas in Arizona and Idaho.³⁶⁸ While inholdings within National Forests are not categorized separately by ownership type, inholdings are found in USFS managed Wilderness Areas in each of the eleven contiguous western states.³⁶⁹ In total, inholdings in National Forest System lands managed under a conservation designation total 416,615 acres across this landscape.³⁷⁰ Statewide in Arizona, “over one million surface and subsurface acres of Trust land are effectively removed from revenue-generating opportunities because they are included within the boundaries of federal holdings.”³⁷¹ Grants or sales to private entities further complicate this landscape. In Montana, for instance, federal and private land surrounds approximately 1.2 million of the state’s 5.1 million acres of state trust lands.³⁷² Surrounding lands that are supposed to generate revenue with lands that are managed for conservation deprives trust beneficiaries of the revenue they were promised and can fuel significant frustration.

2. Perceived Lack of Voice in Public Land Management

Perceived injuries help explain the animosity underpinning the transfer movement, and Utah’s experience offers a telling example. Utah’s first white settlers were members of the Mormon Church who fled persecution in New York, Ohio, Missouri, and then Illinois, hoping to be left alone to follow their faith.³⁷³ They witnessed the murder of their founder and leader, Joseph Smith,³⁷⁴ were pilloried for their religious

³⁶⁷ PUBLIC LAND STATISTICS 2015, *supra* note 79, at 199, 201.

³⁶⁸ *Id.* at 205.

³⁶⁹ U.S. FOREST SERV., DEP’T. OF AGRIC., LAND AREAS OF THE NATIONAL FOREST SYSTEM (2013). Also note that National Forest System lands contain approximately 6 million acres of outstanding mineral claims. Andrew C. Mergen, Surface Tension: The Problem of Federal/Private Split Estate Lands, 33 LAND AND WATER L. REV. 419, 430 (1998).

³⁷⁰ LAND AREAS OF THE NATIONAL FOREST SYSTEM, *supra* note 369.

³⁷¹ *Id.*

³⁷² Karl Puckett, A New Approach: Program Aims to Open Islands of Landlocked State Land, GREAT FALLS TRIB., March 4, 2014, 2014 WLNR 6117724.

³⁷³ JEAN BICKMORE WHITE, THE UTAH CONSTITUTION: A REFERENCE GUIDE 1-2 (1998).

³⁷⁴ *Id.*

beliefs,³⁷⁵ had federal troops called out against them,³⁷⁶ and saw the federal government target their church for dissolution.³⁷⁷ These injuries and the distrust they engendered are still felt in the tightly knit and predominantly Mormon communities that are found throughout rural Utah and much of the Intermountain West.

These scars might have healed in time, but in the eyes of many, the injuries continued. Between 1951 and 1962, eighty-six aboveground nuclear tests were conducted next door, at the Nevada Test Site,³⁷⁸ dispersing radioactive material across much of Utah and the West, and resulting in an increased incidence of certain types of cancers.³⁷⁹ Nevada is still seen by many as the location of choice for long-term storage of high-level nuclear waste.³⁸⁰ Similarly, chemical weapons once stored in locations across the West have been incinerated in Colorado, Utah, and Oregon.³⁸¹

Utah and Nevada were also the destination of choice in a failed proposal to construct an intercontinental ballistic missile system shuttling more than 200 nuclear missiles between 4,600 shelters—"a colossal system extending over one-third of Utah and two-thirds of Nevada."³⁸² Most of that landscape, which for generations had been home to ranching

³⁷⁵ Opposition to Utah's attempts at statehood was often vitriolic and salacious, centering on the religious practices of the territory's Mormon residents. See e.g. H.R. Misc. DOC. NO. 42-208, at 801 (1872) (including testimony from thirty apostate Mormons alleging that the Church "counseled murder and robbery," are "enemies of the United States Government," and would not obey federal law or the Constitution.). See generally, BICKMORE WHITE, *supra* note 373.

³⁷⁶ BICKMORE WHITE, *supra* note 373, at 4.

³⁷⁷ Edmunds-Tucker Act, ch. 397, 24 Stat. 635 (1887). In 1887, Congress passed the Edmunds-Tucker Act dissolving the Mormon Church and directing the federal government to confiscate all church properties valued over \$50,000. Application of the Edmunds-Tucker Act was upheld by the U.S. Supreme Court in *Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. U.S.*, 136 U.S. 1 (1890). The direct effects of the Act were short lived because on October 25, 1893, Congress authorized the release of seized assets because "said church has discontinued the practice of polygamy and no longer encourages or gives countenance to any manner of practices in violation of law, or contrary to good morals or public policy." 28 Stat. 980 (1893).

³⁷⁸ Steven Simon, André Bouville & Charles Land, *Fallout from Nuclear Weapons Tests and Cancer Risks*, 94 AM. SCIENTIST 48, 50 fig.2 (2006).

³⁷⁹ *Id.* See also, MATHESON, *supra* note 101, at 87–103.

³⁸⁰ For a history of efforts to develop Yucca Mountain, see J. SAMUEL WALKER, *THE ROAD TO YUCCA MOUNTAIN: THE DEVELOPMENT OF RADIOACTIVE WASTE POLICY IN THE UNITED STATES* (2009).

³⁸¹ MATHESON, *supra* note 101, at 104–13.

³⁸² *Id.* at 55–86.

families, would have been made off-limits because of national security concerns. Residents saw themselves as an afterthought to the federal government. As Utah's Governor Matheson explained, "The draft EIS devoted thirty-one pages of discussion to the pronghorn antelope, seventeen pages to rare plants, . . . but only five and one-half pages to the impacts on human beings."³⁸³

Another perceived injury occurred in 1996 with designation of the Grand Staircase-Escalante National Monument.³⁸⁴ At roughly 1.9 million acres, the Monument is the largest in the continental United States.³⁸⁵ Former County Commissioner Joe Judd tells of an eleventh-hour trip to Washington D.C. to lobby against monument designation:

When we asked about the area being discussed for the Monument, they chose to tell us that they had no monument plan. "Nothing was going to happen. We don't know anything about it." Then, when we told them where we thought it was going to be, they said, "Do people really live there?" And then I knew we were in trouble.³⁸⁶

Commissioner Judd's description and the actions that proceeded it reinforce a perception of federal ignorance of, and disregard for, the lives of rural westerners that fuels the current discontent.³⁸⁷

³⁸³ Id. at 82.

³⁸⁴ See Establishment of the Grand Staircase-Escalante National Monument, 61 Fed. Reg. 50223 (Sept. 18, 1996).

³⁸⁵ See Grand Staircase-Escalante National Monument, U.S. DEP'T OF THE INTERIOR: BUREAU OF LAND MGMT.: NAT'L CONSERVATION LANDS, <https://www.blm.gov/programs/national-conservation-lands/utah/grand-staircase-escalante-national-monument> (last visited Nov. 14, 2017).

³⁸⁶ Joe Judd, County Collaboration with the BLM on the Monument Plan and its Roads, 21 J. LAND, RES. & ENVTL. L. 553 (2001).

³⁸⁷ While the monument's detractors correctly note that it was designated without contemporaneous state or public input, establishment was no surprise, and the federal government was aware of state or local interests. As early as the 1930s, President Roosevelt considered withdrawing part of the region to create a national monument. James R. Rasband, Utah's Grand Staircase: The Right Path to Wilderness Preservation?, 70 U. COLO. L. REV. 483, 489 (1999). See also, Christopher Smith, Grand Staircase National Monument: It's a New Name But an Old Idea; Monument: New Status, Old Idea, SALT LAKE TRIB., Oct., 6, 1996, at A1 ("In January 1936, the Park Service announced that as a result of the recommendations of the Utah Planning Board, the agency was planning to seek congressional approval for the 6,968-square-mile 'Escalante National Monument.'"). Over the decades that followed, multiple proposals were brought forward to protect federal lands in Southeastern Utah. See generally, SAMUEL J. SCHMIEDING, NAT'L PARK SERV., FROM CONTROVERSY TO COMPROMISE TO COOPERATION: THE ADMINISTRATIVE HISTORY OF CANYONLANDS NATIONAL PARK (2008). Development in Southern Utah was hotly debated

Adding to these frustrations, many state leaders across the West contend that the federal government's failure to actively manage public lands contributes to the "vast expansion of catastrophic wildfire, damaging insects, disease and invasive species."³⁸⁸ Together, this results in a wildfire season that is longer, more extreme, and which produces larger, more damaging fires.³⁸⁹ Others blame the federal government for allowing wild horse populations to grow unchecked, consuming forage needed to support wildlife and cattle.³⁹⁰ Utah is also suing the federal government over claims of title to road rights-of-way across federal public lands.³⁹¹ With multi-generational ties to the landscape, and set against this backdrop of perceived mistreatment by federal officials, it is not surprising that many westerners would prefer to manage the public domain themselves.

3. Economic Instability

The federal government controls the type and level of development that occurs on public lands. In the eyes of some, this leaves local communities at the mercy of federal agencies for access to the resources and resulting revenue upon which their future depends.³⁹²

The federal government has taken steps to offset these concerns through programs like PILT that offset lost tax revenue.³⁹³ Congress also directs that revenue generated from the public domain be shared with state

for more than twenty years prior to the designation, and state as well as local concerns were well known. John D. Leshy, Putting the Antiquities Act in Perspective, in *VISIONS OF THE GRAND STAIRCASE-ESCALANTE, EXAMINING UTAH'S NEWEST NATIONAL MONUMENT* 86–88 (Robert B. Keiter et al. eds.1998). Many of these concerns were addressed in the Proclamation creating the Monument, which included express recognition of valid existing rights. See Proclamation No. 6920, 3 C.F.R. 6920 (1996).

³⁸⁸ W. GOVERNORS' ASS'N, POL'Y RESOL. 12-01, WILDLAND FIRE MGMT. AND RESILIENT LANDSCAPES 1 (2012).

³⁸⁹ *Id.*

³⁹⁰ See *W. Rangeland Conservation Ass'n v. Zinke*, No. 2:14-cv-00327-JNP, 2017 U.S. Dist. LEXIS 107067, at *1 (D. Utah July 11, 2017) (suing to force the federal government to remove wild horses from the range).

³⁹¹ R.S. 2477 Roads: Current Litigation, UTAH'S PUB. POL'Y COORDINATING OFF., <http://publiclands.utah.gov/rs-2477-roads/current-litigation/statewide-complaints/> (last visited Nov. 13, 2017). Separate complaints were filed for each county and are available at *id.*

³⁹² See generally, Robert L. Glicksman, Fear and Loathing on the Federal Lands, *supra* note 4; John D. Leshy, Unraveling the Sagebrush Rebellion: Law, Politics and Federal Lands, *supra* note 3, at 317, 343–50.

³⁹³ 31 U.S.C. § 6902(a)(1); see also *supra* Section III.D.

and local governments affected by the development,³⁹⁴ offsetting the cost of public services (e.g., emergency medical services and road maintenance) incurred because of federal activity.³⁹⁵

Revenue sharing payments can be substantial. From 2006 through 2015, federal land and revenue sharing payments to the eleven contiguous western states averaged over \$3.0 billion annually.³⁹⁶ Budgets in states like Wyoming, where significant mineral development occurs on public lands, depend on commodity production from federal land. For the past nineteen years, at least ninety-nine percent of Wyoming's federal land payments are attributable to mineral revenue sharing, and over the past decade these payments averaged almost \$1.3 billion annually.³⁹⁷

Revenue sharing programs are, however, highly susceptible to commodity price volatility and to production volume changes. In Oregon, federal land payments declined from \$537 million in 1989 to \$112 million in 2000, bouncing back to \$364 million the next year, and then declining steadily back to \$114.7 million in 2015.³⁹⁸ In Utah, federal land payments to the state have been impacted by oil price instability. The state received around \$70 million annually through the late 1990s, with payments increasing steadily until 2006 when they hit \$229 million. Payments increased sporadically, peaking at \$341 million in 2011.³⁹⁹ Year-to-year changes in payments, however, exceeded \$45 million in eight of the last ten years,⁴⁰⁰ and 2015 payments were less than half of the payments received just four years earlier.

Most federal land payments are directed back to the rural communities where the revenue originates.⁴⁰¹ Accordingly, when federal land payments cycle wildly, those shifts have a disproportionate impact on rural counties. This fiscal uncertainty can create profound difficulties for

³⁹⁴ See e.g., 30 U.S.C. § 191 (sharing revenue derived from mineral development occurring on public lands); see also, Section III.D, *supra*.

³⁹⁵ Thomas G. Alexander, *Senator Reed Smoot and Western Land Policy, 1905-1920*, 13 *ARIZ. & THE WEST* 245, 263 (1971) (discussing political compromises leading to enactment of the Mineral Leasing Act of 1920).

³⁹⁶ *HEADWATERS ECON.*, *supra* note 215.

³⁹⁷ *Id.*

³⁹⁸ *Id.*

³⁹⁹ *Id.*

⁴⁰⁰ *Id.*

⁴⁰¹ See e.g., 30 U.S.C. § 191(a) (directing states to give “priority to those subdivisions of the State socially and economically impacted by development of minerals leased under this chapter”).

counties trying to plan for major investments, like schools and infrastructure.

4. Bellicose State Rhetoric

While frustrations are understandable, strident state language can drive a wedge between the state and federal governments, making cooperation more difficult. As a BLM spokesperson recently explained to the Utah Legislature, “It is frustrating as we work to identify the best possible path forward for everyone when some of the entities we are trying to work with consistently feel the need to poke us in the eye and then complain we are not working with them.”⁴⁰²

Utah’s hard line positions have been codified into state law, leaving little room for compromise. Under Utah law, BLM and USFS land management plans should not “designate, establish, manage, or treat” public lands in ways that resemble Wilderness, “including the nonimpairment standard applicable to WSAs or anything that parallels, duplicates, or resembles the nonimpairment standard.”⁴⁰³ Rather, federal plans should “achieve and maintain at the highest reasonably sustainable levels a continuing yield of energy, hard rock, and nuclear resources,”⁴⁰⁴ “achieve and maintain livestock grazing . . . at the highest reasonably sustainable levels,”⁴⁰⁵ and, except in very rare instances, the BLM should not designate Areas of Critical Environmental Concern, “as the BLM lands are generally not compatible with the state’s plan and policy for managing the subject lands.”⁴⁰⁶ Similar demands apply to including rivers in the National Wild and Scenic River Systems⁴⁰⁷ and to Wilderness Area designation.⁴⁰⁸

To advance its land management objectives, the Utah legislature establishes expansive “energy zones” where the “highest management priority . . . is responsible management and development of existing

⁴⁰² Amy Joi O’Donoghue, *Battle Between Utah’s Rural Counties and BLM Intensifies*, DESERET NEWS (June 28, 2014), <https://www.deseretnews.com/article/865605994/Battle-between-Utahs-rural-counties-and-BLM-intensifies.html>.

⁴⁰³ UTAH CODE ANN. § 63J-8-104(1)(b) (2014).

⁴⁰⁴ *Id.* § 63J-8-104(1)(d).

⁴⁰⁵ *Id.* § 63J-8-104(1)(e).

⁴⁰⁶ *Id.* §§ 63J-8-104(1)(l), 63J-4-401(8)(c).

⁴⁰⁷ *Id.* § 63J-8-104(8)(a).

⁴⁰⁸ *Id.* § 63J-8-104(8)(j).

energy and mineral resources.⁴⁰⁹ Accordingly, the state supports “full development of all existing energy and mineral resources”⁴¹⁰ within these zones and calls upon the federal government to “expedite the processing, granting, and streamlining of mineral development and energy leases and applications to drill, extract, and otherwise develop all existing energy and mineral resources” within them.⁴¹¹ The legislature also created “Timber Agricultural Commodity Zones” where the federal government is directed to “expedite the processing, granting, and streamlining of logging and forest product harvesting.”⁴¹² Similarly, the Utah legislature created “Grazing Agricultural Commodity Zones” where grazing permitting is to be expedited.⁴¹³

Utah’s commodity-production-first demands conflict with federal land managers’ multiple-use mandate and land management plans. There is little room for compromise when state employees must demand the impossible. Untenable demands also mislead the public into believing that the state can dictate federal management and that full development is a viable goal. When these demands are not met, those that expect results consistent with legislative edicts become only more frustrated. The result is a self-sustaining cycle that increases tension.

C. Alternatives to Land Transfers

Addressing the root causes of frustration is necessary to dampen the fires fueling the transfer movement, and improving public land management is a laudable goal. The ideas presented below are not an exhaustive list, but examples intended to drive further discussions.

⁴⁰⁹ Id. §§ 63J-8-105.5(3)(b), (c) (Uintah Basin Energy Zone). The Green River Energy Zone contains a similar statement regarding energy development being the “highest management priority” for Carbon County, but notes that energy development within Emery County is only a “high priority” that must be “balanced” with other ecological, cultural, and recreational values. Id. at § 63J-8-105.7(3)(b)–(c). In 2015, the Utah created an energy zone in San Juan County that overlaps proposed Wilderness and National Conservation Area designations. Id. § 63-8-105.2 (2015).

⁴¹⁰ Id. § 63J-8-105.5(4)(a) (Uintah Basin Energy Zone); id. at § 105.5(4)(a) (2014) (Green River Energy Zone).

⁴¹¹ Id. § 63J-8-105.5(5)(b) (Uintah Basin Energy Zone); id. at § 105.5(5)(b) (Green River Energy Zone).

⁴¹² Id. § 63J-8-105.9(7)(b).

⁴¹³ Id. § 63J-8-105.8(7)(b).

1. Comprehensive Review and Revision of Public Land Laws

The last systematic review of federal public land law, policy, and governance was conducted by the Public Land Law Review Commission of 1965-1969.⁴¹⁴ Since that commission released its final report in 1970, the challenges and opportunities facing federal public lands have become more numerous and complex. Our understanding of science and ecological process has also increased dramatically, and the difficulties inherent in striking a balance between competing interests has grown accordingly. We have responded by modifying both law and policy, but these revisions are poorly integrated. The result is a complex web of overlapping laws that are challenging for even the most sophisticated of managers to navigate.

As we approach the fiftieth anniversary of the last federal public land law review, it is time to ask what we want from our public lands, and what public land heritage we want to leave for our children. The current political climate makes it difficult to envision Congress proposing the kind of comprehensive bipartisan review we need, and those who benefit from the status quo, whether on the left or the right of the political spectrum, will likely oppose any effort that threatens their position. The possibility of failure, however, should not prevent us from seeking improvement.

2. Adequate Agency Funding

We cannot continue to bemoan resource conditions and permitting delays while simultaneously depriving public land managers of the staff and resources required to do their jobs. “Staffing levels for those dedicated to managing National Forest System lands has decreased by [thirty-nine] percent—from approximately 18,000 in 1998 to fewer than 11,000 in 2015.”⁴¹⁵ Land management funding fell by thirty-three percent, impacting “critical projects involving energy pipelines, geothermal, electric transmission, hydropower, telecommunication infrastructure, including cellular towers and traditional line service and broadband facilities.”⁴¹⁶ Land management planning funding fell by sixty-four percent, significantly effecting the USFS’s “ability to engage with the public and partners to address management issues and opportunities. . . . These efforts are essential for garnering public support and reducing

⁴¹⁴ THE PUB. LAND LAW REV. COMM’N, 91ST CONG., ONE THIRD OF OUR NATION’S LAND: A REPORT TO THE PRESIDENT AND TO THE CONGRESS BY THE PUBLIC LAW REVIEW COMMISSION.

⁴¹⁵ FOREST SERV., DEP’T OF AGRIC., THE RISING COST OF WILDFIRE OPERATIONS: EFFECTS ON THE FOREST SERVICE’S NON-FIRE WORK, at 7 (2015).

⁴¹⁶ *Id.* at 13.

appeals and litigations, which impacts our ability to implement key restoration efforts and increases implementation costs.”⁴¹⁷

Charging market rates for commodities produced from public lands, and returning those funds to the agencies that manage those lands, is a simple way to begin addressing the funding shortfall. Under federal law, the United States charges a 12.5 percent royalty on oil and gas produced from federal lands.⁴¹⁸ In contrast, within the Intermountain West, states charge between 16.67 percent and 18.75 percent production royalties.⁴¹⁹ Raising the federal oil and gas royalty rate to 16.67 percent would have produced over \$970 million in additional revenue during 2014.⁴²⁰ Under federal law roughly half of these funds would have been distributed to the states where the development occurred—the remainder could have been used to fund the agencies managing our public lands.

Modernizing federal coal leasing regulations provides a similar opportunity. Current regulatory subsidies, marketing loopholes, and royalty valuation policy deprived the federal government of about \$850 million between 2008 and 2012,⁴²¹ and changing the point at which coal value is measured to reflect the gross market price would have generated an additional \$5.6 billion in federal revenue.⁴²² Roughly half of this revenue would have gone to the states where the development occurred; the remainder could have funded public land management.

Hard rock mining is also ripe for reform. Hard rock miners on federal land do not pay any federal mineral royalty. The federal government is, however, free to impose a royalty on minerals mined from federal lands, or to tax mined minerals.

Though some will argue that any royalty or tax increase will slow economic growth, the prevalence of state taxes on natural resource commodity development belies the point. As of 2014, at least thirty-four states imposed a severance tax on natural resources, and these taxes

⁴¹⁷ *Id.* at 15.

⁴¹⁸ 43 C.F.R. § 3103.3-1(a)(1) (2015).

⁴¹⁹ A Fair Share: The Case for Updating Federal Royalties on Our Public Lands, CTR. FOR W. PRIORITIES 2 (June 18, 2015), http://www.westernpriorities.org/wp-content/uploads/2015/06/Royalties-Report_update.pdf.

⁴²⁰ *Id.* at 7 (disclosing additional revenue distributed to states, total additional revenue would be twice what is disclosed because states receive only half of the revenue produced).

⁴²¹ HEADWATERS ECON., AN ASSESSMENT OF U.S. FEDERAL COAL ROYALTIES: CURRENT ROYALTY STRUCTURE, EFFECTIVE ROYALTY RATES, AND REFORM OPTIONS 25 (2015), <http://headwaterseconomics.org/wphw/wp-content/uploads/Report-Coal-Royalty-Valuation.pdf>.

⁴²² *Id.* at 24.

provided states with \$17.8 billion in revenue.⁴²³ All eleven contiguous Western States have severance taxes, which generated over \$2.9 billion to support state government programs.⁴²⁴ New Mexico's severance tax does not appear to have chilled energy development, as the state ranks fourth in the nation in oil production,⁴²⁵ ninth in natural gas production,⁴²⁶ and tenth in coal production.⁴²⁷ Wyoming also ranks eighth in oil production,⁴²⁸ sixth in natural gas production,⁴²⁹ and first in coal production despite taxing development.⁴³⁰

3. Collaboration

Federal land management agencies are required to coordinate their management activities with state and local governments. If utilized to their full potential, these requirements could help states and local residents address land management challenges.⁴³¹ Under FLPMA, the BLM must develop and periodically revise plans for public land management.⁴³² Critically, the BLM must:

[T]o the extent consistent with the laws governing the administration of the public lands, coordinate the land use inventory, planning, and management of activities of or for such lands with the land use planning and management actions of . . . the States and local governments within which the lands are located. . . . Land use plans of the Secretary under this section shall be consistent with State and local plans to the maximum

⁴²³ LEE ET AL., *supra* note 224, at 7.

⁴²⁴ *Id.*

⁴²⁵ Crude Oil Production Rankings, U.S. ENERGY INFO. ADMIN., <https://www.eia.gov/state/rankings/#/series/46> (last visited Nov. 15, 2017).

⁴²⁶ Natural Gas Production Rankings, U.S. ENERGY INFO. ADMIN., <https://www.eia.gov/state/rankings/#/series/47> (last visited Nov. 15, 2017).

⁴²⁷ Coal Rankings, U.S. ENERGY INFO. ADMIN., <https://www.eia.gov/state/rankings/#/series/48> (last visited Nov. 15, 2017).

⁴²⁸ Crude Oil Production Rankings, U.S. ENERGY INFO. ADMIN., <https://www.eia.gov/state/rankings/#/series/46> (last visited Nov. 15, 2017).

⁴²⁹ Natural Gas Production Rankings, U.S. ENERGY INFO. ADMIN., <https://www.eia.gov/state/rankings/#/series/47> (last visited Nov. 15, 2017).

⁴³⁰ Coal Rankings, *supra* note 427.

⁴³¹ See STUDY ON MANAGEMENT OF PUBLIC LANDS IN WYOMING, *supra* note 247, at 256–64.

⁴³² 43 U.S.C. § 1712(a) (2012) (develop and maintain land use plans); *id.* § 1712(c)(4) (rely on public land inventories).

extent [s]he finds consistent with Federal law and the purposes of this Act.⁴³³

Similarly, the USFS must “coordinate land management planning with the equivalent and related planning efforts of . . . state and local governments.”⁴³⁴ In preparing or revising land and resource management plans, the USFS must consider state and local government objectives and the “compatibility and interrelated impacts of these plans and policies; . . . [o]pportunities for the plan to address the impacts identified or contribute to joint objectives; and . . . [o]pportunities to resolve or reduce conflicts, within the context of developing the plan’s desired conditions or objectives.”⁴³⁵

FLPMA’s consistency requirement provides the eleven contiguous western states with a seat at the table for decisions involving management of over 174 million acres of BLM land. The USFS regulations grant these states and their local governments a substantial role in planning for the over 140 million National Forest System acres. But to be effective, local input and plans must contain detailed and realistic descriptions of future land use objectives and specific steps to move toward that desired future condition. While many Utah counties have undertaken some planning, many county plans lack critical information or detail. This problem may be more acute in rural counties that lack the staff and resources to complete a comprehensive planning process.⁴³⁶ Building planning capacity and helping counties prepare high-quality plans could give local governments a more effective voice in public land management.

NEPA also provides an opportunity for local governments to engage in public land management decisions. NEPA requires a detailed statement on the environmental impacts of, and alternatives to, every “major federal action significantly affecting the quality of the human environment.”⁴³⁷ State or local agencies may become a cooperating agency⁴³⁸ and assist in the NEPA analysis.⁴³⁹ Cooperating agency status can give state and local governments significant leverage, as the lead federal agency must “[u]se the environmental analysis and proposals of cooperating agencies with

⁴³³ Id. § 1712(c)(9).

⁴³⁴ 36 C.F.R. § 219.4(b)(1) (2015).

⁴³⁵ Id. § 219.4(b)(2).

⁴³⁶ Ashley Scarff, Univ. of Utah Dept. of City & Metro. Planning, *An Analysis of the State of County Comprehensive Planning in Utah* (2015) (on file with author).

⁴³⁷ 42 U.S.C. § 4332(2)(c).

⁴³⁸ 40 C.F.R. § 1508.5.

⁴³⁹ 40 C.F.R. § 1501.6.

jurisdiction by law or special expertise, to the maximum extent possible consistent with its responsibility as lead agency.”⁴⁴⁰

As with FLPMA’s coordination requirement, a state or local government’s ability to influence the NEPA process depends heavily on the quality of the information brought to the table. Opinions and suggestions are not enough, and strident demands are unlikely to foster collaboration. States and local governments must invest the time and effort to prepare rigorous fact-based plans, environmental analyses, and thoughtful proposals. If state and local input is poorly developed or articulated, plans stand little chance of influencing federal decisions. Indeed, strident or poor quality plans may do more harm than good if they demand the undeliverable, are ignored by federal agencies, and local governments do not understand why their plans are not incorporated into federal decisions.

4. Rationalizing the Landscape

Western landscapes are highly fragmented. Reducing fragmentation by consolidating state trust lands reduces planning and management conflicts for federal land managers and facilitates planning and management for revenue-generating uses of state trust lands. FLPMA authorizes both the BLM and USFS to undertake fragmentation-reducing land exchanges by trading developable federal lands for state trust lands that are better suited for conservation.⁴⁴¹ The two key requirements for a FLPMA land exchange involve determinations that the parcels to be exchanged are of equal value, and that the exchange is in the public interest.⁴⁴² Congress can bypass FLPMA by specifically authorizing a land exchange and streamlining the approval process.

The Utah Recreational Land Exchange (“URLE”) is an example of a successful recent exchange.⁴⁴³ The URLE involved over 61,000 acres, removing the threat of development from sensitive lands along the Colorado River and near two National Parks while allowing the state to pursue revenue generation in more appropriate locations.

Although the fragmentation-reducing benefits of land exchanges are clear, high transaction costs and the challenges posed by enacting project-

⁴⁴⁰ 40 C.F.R. § 1501.6(2)(a)(2).

⁴⁴¹ See 43 U.S.C. §§ 1715(a), 1716(a) (2012).

⁴⁴² 43 U.S.C. § 1716(a), (b).

⁴⁴³ Utah Recreational Land Exchange Act of 2009, Pub. L. No. 111-53, 123 Stat. 1982 (2009).

specific legislation foil most exchange efforts.⁴⁴⁴ Reform could improve the process, and groups such as the Western Governors' Association are moving toward that end.⁴⁴⁵ But even absent reform, land exchanges provide a proven and valuable tool for addressing a profound and pervasive challenge.

5. Transition Assistance

Western communities sprung up around the resources settlers needed to survive and flourish—water, rich farmland, timber, and minerals. As the era of manifest destiny ended and our nation began the transition from public land disposal to multiple-use, sustained-yield management, communities often saw access to the resources on our public lands decline. The transition from commodity development has been painful for communities that struggled to anticipate and adapt to changing societal priorities and for communities that were unable to diversify their economies. It behooves us to assist communities that developed on promises of ready natural resource access to transition to a less commodity-dependent future. Past efforts to aid in this transition were often ungainly, but they contain valuable lessons nonetheless. The timber crisis of the 1980s provides a particularly relevant example of both the risk and the opportunity presented.

During the 1980s, the Pacific Northwest was immersed in a bitter controversy over logging of old-growth forests, declining old-growth forest dependent species, and the role of federal forests in regional and local economies. The northern spotted owl was protected under the ESA in 1990,⁴⁴⁶ and lawsuits over federal timber harvests shut down every timber sale “that would log suitable habitat for the northern spotted owl” in Washington, Oregon, or California.⁴⁴⁷ Timber harvests from federal

⁴⁴⁴ See John Ruple & Robert Keiter, *The Future of Federal-State Land Exchanges*, S.J. QUINNEY COLL. OF L. LEGAL STUDIES RES. PAPER SERIES (2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2457272 (explaining the benefits of, and barriers to, land exchange effectuation).

⁴⁴⁵ See W. Governors' Ass'n Pol'y Resol. 2016-04, *Federal-State Land Exchanges and Purchases* (2016), http://westgov.org/images/editor/2016-04_Federal-State_Land_Exchanges.pdf.

⁴⁴⁶ *Determination of Threatened Status for the Northern Spotted Owl*, 55 Fed. Reg. 26114 (June 26, 1990) (to be codified at 50 C.F.R. pt. 17).

⁴⁴⁷ *Seattle Audubon Soc'y v. Moseley*, 798 F. Supp. 1484, 1493–94 (W.D. Wash. 1992) (enjoining Forest Service timber sales that would log suitable habitat for the northern spotted owl).

land fell by eighty percent between 1989 and 1994,⁴⁴⁸ and 14,000 forest products jobs were lost.⁴⁴⁹

In convening a conference to address these issues, President Clinton set forth five principles to guide development of a management strategy supporting both old-growth related species and a sustainable timber industry, including direction that

we must never forget the human and the economic dimensions of these problems. Where sound management policies can preserve the health of forest lands, sales should go forward. Where this requirement cannot be met, we need to do our best to offer new economic opportunities for year-round, high-wage, high-skill jobs.⁴⁵⁰

The Northwest Economic Adjustment Initiative (“NWEAI”) was an outgrowth of that effort and sought to provide relief for distressed timber communities, fostering long-term and environmentally responsible economic development consistent with and respectful of rural community character, and improving cooperation between governments.⁴⁵¹ The NWEAI provided economic development and impact mitigation funds for assisting workers and their families, business and industry, communities and infrastructure, and support ecosystem services.⁴⁵² From 1994 through 1999, NWEAI funding totaled approximately \$1.2 billion.⁴⁵³

Admittedly, “no program can make career transition simple or painless, and the diversity of people and their approaches to changes in their lives must be accommodated. Positive outcomes may take a long time and cannot be measured simply in terms of wages or job placement.”⁴⁵⁴

⁴⁴⁸ TERRY L. RAETTIG & HARRIET H. CHRISTENSEN, *TIMBER HARVESTING, PROCESSING, AND EMPLOYMENT IN THE NORTHWEST ECONOMIC ADJUSTMENT INITIATIVE REGION: CHANGES AND ECONOMIC ASSISTANCE 3* (1999), www.fs.fed.us/pnw/pubs/pnw_gtr465.pdf.

⁴⁴⁹ *Id.* at 8.

⁴⁵⁰ PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: WILLIAM J. CLINTON 388 (1993, Book I 993).

⁴⁵¹ RAETTIG & CHRISTENSEN, *supra* note 448, at 1.

⁴⁵² Terry L. Raettig & Harriet H. Christensen, *The Northwest Economic Adjustment Initiative: Background and Framework*, in *NORTHWEST FOREST PLAN: OUTCOMES AND LESSONS LEARNED FROM THE NORTHWEST ECONOMIC ADJUSTMENT INITIATIVE 2* (Harriet Christensen et al., eds., 1997).

⁴⁵³ *Id.*

⁴⁵⁴ Paul Sommers, *Research on the Northwest Economic Adjustment Initiative: Outcomes and Process*, in *NORTHWEST FOREST PLAN: OUTCOMES AND LESSONS LEARNED FROM THE NORTHWEST ECONOMIC ADJUSTMENT INITIATIVE 69* (Harriet Christensen et al., eds., 1997).

Efforts like the NWEAI are needed across the West to help resource-dependent communities transition to more diverse, stable, and prosperous futures. But helping communities adapt to our changing world and societal priorities needs to begin before harsh social dislocations occur. With early and effective assistance, maybe we can help residents across the West retain the ties to the land, the stable economies, and a future for their kids that celebrates multi-generational ties to the land. In the end, after all, that appears to be what many rural westerners want most.

CONCLUSION

Like the sagebrush rebels before them, today's transfer advocates feel left behind by evolving public land management priorities that depart from their vision of how the West should be managed. The TPLA and its progeny appeal to that pain and frustration, but offer only empty answers to real questions, and in so doing, distract us from opportunities to address the root causes of frustration over public land management. The law is clear: the federal government possesses plenary power over the public domain, including the power to retain the land in federal ownership, and to do so indefinitely. The federal government is not obligated to dispose of public land beyond the almost 400 million acres of land surface it already gave up in the eleven contiguous western States. Statehood enabling acts do nothing to change this settled legal reality.

Even if transfer advocates overcome long legal odds and a disposal obligation is found to exist, such an obligation would not necessitate giving the land away, let alone giving the land to the states. Furthermore, that duty to dispose would almost certainly not extend to lands that are mineral in character, leaving states without the revenue they would need to manage the lands they fought so hard to obtain. States would be faced with significant fiscal and policy challenges, and the public would see fewer and fewer opportunities to engage in land management decisions.

The fate of our western public lands is very important, as is the fate of those communities that depend on our public lands. We must look beyond the empty promise of easy riches and begin the hard work needed to address profound questions raised by the evolution of public land management policies, including what we owe to those who live closest to the public domain. Their pain and frustration are real, and that pain and frustration needs to be addressed if the next generation is to avoid revisiting these same battles. There are opportunities to improve public land management: updating laws, consolidating lands, fully funding

agencies and community development, and cooperating with our neighbors all hold promise.